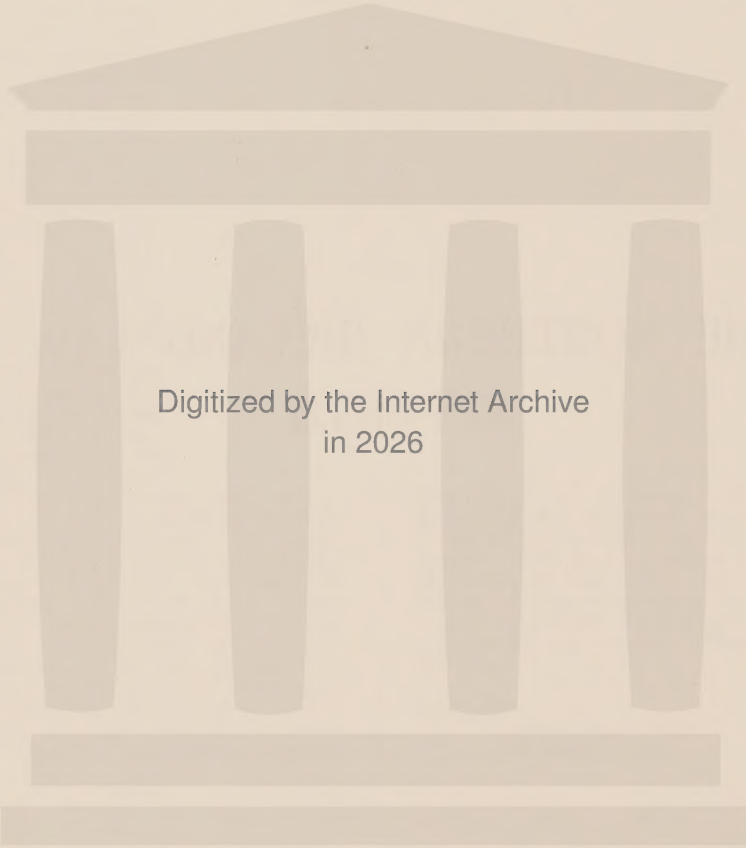


THE NORTHERN IRELAND LAW  
REPORTS

1928.



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# THE NORTHERN IRELAND LAW REPORTS

CONTAINING  
REPORTS OF CASES ARGUED AND DETERMINED  
IN  
THE HIGH COURT OF JUSTICE  
AND BEFORE THE  
JUDICIAL COMMISSIONER LAND COMMISSION  
AND ON APPEAL THEREFROM IN  
THE COURT OF APPEAL  
IN  
*NORTHERN IRELAND*  
EDITED BY  
T. HENRY MAXWELL,  
ONE OF HIS MAJESTY'S COUNSEL.

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1928.

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FOR NORTHERN IRELAND.

1928.

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**Lord Chief Justice.**

THE RIGHT HON. WILLIAM MOORE.

**Lords Justices of Appeal.**

THE RIGHT HON. JAMES ANDREWS.

THE RIGHT HON. RICHARD BEST.

**Chancery Division.**

THE HON. DANIEL MARTIN WILSON.

**King's Bench Division.**

THE RIGHT HON. WILLIAM MOORE.

THE RIGHT HON. THOMAS WATTERS BROWN.

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CHANCERY DIVISION.

# CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND.

---

IN THE MATTER OF THE TRUSTS OF THE WILL OF

WILLIAM GIHON, DECEASED.

DAVISON AND ANOTHER

v.

KING AND ANOTHER.

(1927. No. 80.)

Ch. Div.  
1927  
WILSON J.

---

May 17 18  
June 7

*Company—Sale of Company's Property—Declaration of Dividends out of proceeds—Capital or income—Tenant for life and remainder man.*

A testator provided that his trustees might sell his business property and goodwill to a limited company formed to continue and take over his business in consideration of cash and fully paid shares in the company and partly in cash, but so that the shares should not exceed £10,000 in nominal value. After the testator's death the business was

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1927  
WILSON J.

---

DAVISON  
v  
KING

converted into a limited company with a capital of £10,000, divided into 500 ordinary shares of £20 each, which at the time of the action were held by the plaintiffs as trustees of his will upon trust for K for life with remainder to B for life with remainders over. In February, 1925, the directors with the approval of K accepted a proposal for purchase of the concern for £35,000 and the sale was duly completed. The company by resolution on 7th October, 1926, declared the sum of £33,201 (which included the amounts realized for the entire business premises and machinery) to be net profits available for dividend, and resolved that a dividend of £330 per cent. free of income tax should be paid thereout.

*Held*, by Wilson J., that in as much as the whole operations of the company from 1st January, 1925, were realization and liquidation and not trading nor carrying on of the business authorized by the Memorandum of Association, the dividend of £330 per cent. payable to the plaintiffs as trustees of the settlement created by the will of the deceased, should be held and applied by them as capital and not as income.

A limited company cannot realize its entire assets and, having set aside an amount equal to its nominal capital and discharged its liabilities, divide the surplus as income or profits under the guise of declaring a dividend: to do so would be a fraud upon the winding up provisions of the Companies Act, 1908.

SUMMONS by the trustees under the settlement effected by the last will dated the 21st December, 1905, of William Gihon, deceased, for the determination of the following questions :—

Whether a dividend of £330 per cent. authorized to be paid by the Lisnafillan Bleaching, Dyeing and Finishing Company, Limited, at a general meeting of the company held on 7th October, 1926, and payable to the plaintiffs as the trustees of the settlement created by the will of the deceased should be held and applied by the plaintiffs (a) as income of the settlement payable to the present life tenant, or (b) as capital subject to the trusts of the settlement, or (c) partly as income and partly as capital.

The following statement of the facts is taken from the judgment of Wilson J. :—

The late Mr. William Gihon resided at Lisnafillan House, Co. Antrim, at the date of his death and for some time prior thereto, had carried on business in partnership with one William Ewing as the Lisnafillan Bleaching, Dyeing and Finishing Company. The premises on which this busi-

ness was carried on were situated at Lishnafillan adjacent to deceased's house and were owned by him in fee.

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The deceased made his will on 21st December, 1905, and appointed trustees of the will, and devised his real estate to his trustees in trust for his wife, and to each of his sons in order of seniority in tail, with remainder to his daughter the defendant Mrs. King for life, and then to her issue, and to the testator's other daughters as set out in the will, with remainder to the testator's brother-in-law, George Beggs for life, with remainder to his eldest son the defendant William Beggs for life, with remainder to his first and every other son successively in tail, with remainders over as in the will. The testator also gave his daughter, the defendant Mrs. King, power to appoint his real estate or any other property settled on the same trusts as it, by will in favour of a husband surviving her for his life, any interest so appointed to have priority to the subsequent trusts declared by his will. The testator further bequeathed his personal residuary estate to his trustees on trusts similar so far as possible to the trusts declared of his real estate, or to sell same at their discretion. He also provided that his trustees might sell his business property and goodwill to a limited company formed to continue and take over the business in consideration of fully paid shares in the company and partly in cash, but so that the shares should not exceed £10,000 in nominal value. He also provided that till such sale his trustees might lease the business assets and premises for any term of years. He also empowered his trustees to hold in any company which might hold the premises, shares not exceeding £10,000 in nominal value, and he declared that all moneys, stocks, funds, shares or securities paid or transferred to his trustees on the sale or winding up of any such trade or business should fall into his residuary estate.

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DAVISON  
v.  
KING

William Gihon died on the 10th January, 1907, probate of his will was granted to his trustees and executors on the 25th October, 1907. His wife, Grace Gihon, and G. L. MacLaine are both dead, and the plaintiffs are the present trustees of the will. After the death of William Gihon the business was converted into a limited company on the 25th

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DAVISON  
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November, 1907. The capital of the company was £10,000 divided into 500 ordinary shares of £20 each. The business premises and an undivided moiety of the machinery were demised to the company for the term of 1,000 years from 10th January, 1907. The trustees of William Gihon were allotted 225 ordinary shares of £20 each in the company, and these are now held by the plaintiffs. The plaintiffs in respect of this holding were duly elected directors of the company. The testator was survived by only one child, the defendant Mrs. King, and she resides with her husband, Major Charles E. S. King, at Lisnafillan House. Major King is also a director of the company and he and his wife, the defendant Mrs. King, each hold 5 ordinary shares in the company. There is no issue of the marriage of Major King and Mrs. King. The testator's brother-in-law, George Beggs, is dead. His eldest son William Beggs is alive and resides in Fort Work, Texas, U.S.A. The other directors are G. A. Parkes, Thomas Wilfred Haughton, Frederick Joseph Henderson, and Robert Haig, and the remaining 265 shares of the company are held as to 245 by William Moore Knox and R. G. Simpson, as to 15 by Thomas W. Haughton, Frederick J. Henderson and George A. Parkes, and as to 5 by Robert Haig. In January, 1905, an offer was made to the directors of the company for the sale of the company's premises at Lisnafillan to an artificial silk company in course of formation, and on 11th February, 1925, the directors agreed to accept an offer of £35,000 for the premises subject to the approval of William Gihon's trustees. The trustees informed Mrs. King of the offer and she assented to the proposal. The trustees then agreed to the proposal, and on 28th April, 1925, a written agreement for sale was made between the company and Frederick M'Kibben as agent for the purchasers. The purchase took the form of a sub-lease of the premises in which the company's business had hitherto been carried on, for a term of 950 years from 1st July, 1925, at the rent of £750 (the same rent as the company paid to the Gihon Estate for the premises), and the sub-lease was to be completed on the 1st July, 1925, and on completion of the sub-lease, the sub-lessees were to be entitled to the

machinery and plant in the second part of the schedule to the agreement (being practically all the machinery save the moiety of the original machinery which belonged to the Gihon Estate). The lessors were given liberty to remove the Gihon half of the machinery before 1st September, 1925, and power to sell same by auction or otherwise before that date. The sale was duly completed and the purchase money, £35,000, was paid in accordance with the agreement. The 1907 company now intend to assign their reversion on this sub-lease to the Gihon trustees and then to go into voluntary liquidation.

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---

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v.  
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The annual meeting of the company was held on 7th October, 1926. The accounts of 17th February, 1926, were adopted including a 10 per cent. dividend, and those of 1st September, 1926, including a 75 per cent. dividend of £7,500, and the net profit of £33,201 8s 0d was declared available for distribution. It was proposed by Mr. Haughton, and seconded by Major King that a dividend of £330 per cent. free of income tax be paid out of the amount declared by the directors to be available for that purpose. One of the plaintiffs, Mr. Nial Nelson proposed that the dividend be restricted to 70 per cent., but this was not seconded and the original proposal was carried. The chairman then explained that the realization of the company's assets was being proceeded with and a meeting to pass a resolution for winding up would be necessary, and a resolution was passed that the arrangements for that meeting should be left to the directors.

*Monroe K.C.* and *MacDermott* for the trustees of the will of William Gihon, deceased :—

Mr. Nial Nelson adopted the attitude and moved the amendment restricting the dividend to seventy per cent., after a careful consideration of his duties as a trustee, bound to protect not only the tenant for life but the remainder men.

*M'Gonigal K.C.* for William Beggs the remainder man :—

I contend that the balance apart from trading profits is capital. The law is expressed in this way in *Jarman on Wills* (sixth edition), p. 1,225 “ where a company is wound

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up, and there is a surplus after payment of debts and repaying to the shareholders the capital paid upon their shares, such surplus is capital, but whether a reserve fund of undivided profits is to be treated as income seems to depend upon the regulations of the company. The question in this form does not appear to have arisen between tenant for life and remainder-man, but it seems clear that the same principle would be applicable in that case, as in the case where the dispute is between preference and ordinary shareholders."

We rely on *Birch v. Cropper* (1), and on *In re Armitage* (2) where it was held that the right of a tenant for life of shares is only to receive dividends declared during his life. The principle referred to by Lindley L.J. in *In re Armitage* (2), at p. 346 should be applied in the present case. The court is not to be bound by mere words, but ought to inquire into the real meaning of the transaction. In *In re Thomas* (3) Lord Cozens-Hardy M.R. said at pp. 342-3, "The law on the case has been very carefully brought to our notice. *Bouch v. Sproule* (4) the leading authority in the House of Lords, seems to me to put it in a way which absolutely binds us. It was this: that whether it is capital or income depends upon the intention of the company declaring the so-called dividend. It will not be decided one way or the other by calling it dividend. I quite agree that we must look to see what is the real intention of the parties. Here it is called dividend. Is there anything to suggest an intention on the part of any human being to capitalize this sum which was referred to in this note to the scheme? In my opinion there is none." In *Frames v. Bultfontein Mining Company* (5) it was held that the term "net profits" was intended to apply to profits made by the Company as a going concern, and not to profits made by a sale of the whole undertaking and assets in a winding up. I submit that the use of the term taxable profits in the circular letter of 18th March, 1927, is in effect an admission that the non-taxable profits are really capital. It is plain on the face of this will that the testator never intended the tenant for life to get such a

(1) 14 A.C. 525.

(3) [1916] 2 Ch. 331.

(2) [1893] 3 Ch. 337.

(4) 12 A.C. 385.

(5) [1891] 1 Ch. 140.

profit as is attempted here. Looking at the reality of the transaction, this is a distribution of capital, and not of income.

*Murphy K.C.* and *M<sup>r</sup> Kean* for Mrs. A. E. King, the tenant for life :—

We submit that the will itself contemplated the events that have happened. The cases which have been quoted are cases of companies in liquidation. There is a necessary distinction between a company in liquidation and one not in liquidation. In the present case a valid dividend has been declared and in fact paid to the shareholders. We submit that the principle applicable is that laid down by Fry L.J. in *Sproule v. Bouch* (1) at p. 653. In the House of Lords Lord Herschell at p. 397 expressly stated that he quite agreed with the principle which had been laid down by Fry L.J. in the Court of Appeal. In *In re Malam* (2) Stirling J. applied the principle laid down in *Sproule v. Bouch* (1).

The passage from Jarman on Wills which has been relied on, on behalf of the remainder-man merely gives the view taken by the editor of the three cases referred to. This is not a case where a company has been wound up. In *In re Armitage* (3) Lindley L.J. said at p. 346, “ The moment the company got into liquidation there was an end of all power of declaring dividends and of equalizing dividends, and the only thing that the liquidator had to do was to turn the assets into money, and divide the money among the shareholders in proportion to their shares.” We submit that is the distinction between the cases relied on, on behalf of the remainder-man and the present case. We rely on the passage from the speech of Lord Macnaghten in *Birch v. Cropper* (4) at p. 545. In the present case the distribution of profits took place while the company was a going concern. We rely on *Lubbock v. British Bank of South America* (5). It does not follow, admitting that this distribution of profits took place, after contemplation of liquidation, that this was as part of the liquidation. In *In re Taylor* (6) Tomlin J. adopted the in-

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| (1) 29 Ch. D. 635     | (4) 14 A.C. 525.      |
| (2) [1894] 3 Ch. 578  | (5) [1892] 2 Ch. 198. |
| (3) [1893] 3 Ch. 337. | (6) [1926] 1 Ch. 923. |

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tention of the company as the guiding principle. In the present case there is no doubt that it was the intention of the company to distribute this profit as dividend. The substance of the transaction is in accordance with the form. In *In re Tedlie* (1) the trustees of a will appropriated preference and ordinary shares in a company to answer a settled legacy. Subsequently the company converted the preference shares into ordinary shares, and also allotted shares in a Dutch company to the ordinary shareholders, with the result that the trustees received a payment of £147 in respect of their preference shares and twenty-six shares in the Dutch company in respect of their ordinary shares. It was held that the £147 constituted capital, being a payment made to preference shareholders in consideration of their giving up their preferential rights, but that in the circumstances the twenty-six shares must be treated as a bonus, and belonged to the tenant for life. The distinction sought to be made between trading profits of the company and other profits is fallacious.

They also referred to *Foster v. New Trinidad Lake Asphalt Company* (2), *Wall v. London and Provincial Trust Ltd.* (3), *Carson v. Carson* (4), *Bond v. Barrow Haematite Steel Co.* (5).

*Cur. adv. vult*

June 7

WILSON, J. : This summons was taken out by the plaintiffs, the present trustees of the will of William Gihon deceased, against the tenant for life under the will, the defendant Mrs. A. E. King, and the presumptive remainderman, the defendant William Beggs, for the determination of the following question, viz., whether in the events that have happened, a so-called dividend of £330 per cent. authorized to be paid by The Llanafyllan Bleaching, Dyeing and Finishing Company, Limited, at a general meeting held on the 7th October, 1926, and payable to the plaintiffs as trustees of said will, is to be held and applied by the plaintiffs as income of the settled property payable to the present tenant for life or as capital subject to the trusts of the will or partly as income and partly as capital.

(1) 91 L.J. (Ch.) 346.

(3) [1920] 1 Ch. 45.

(2) [1901] 1 Ch. 208.

(4) [1915] 1 I.R. 321.

(5) [1902] 1 Ch. 353.

and if the latter, what proportions of the said sums are to be treated as income, and as capital.

His Lordship, having stated the facts, continued :—

After this sale—though no such business as either Mr. Gihon and his partner prior to 1907, or the company from 1907 to 1925, can be or has been carried on—the company has not passed any resolution to wind up under the Companies Acts, but the directors and the company purport to carry on the objects stated in their Memorandum of Association and to exercise the powers granted to the directors and the company under the articles of agreement, although, save for the passing of a resolution to wind up, the business of the registered company has to the knowledge of both directors and shareholders not been carried on and is at an end.

The company registered in 1907 is not before me in this litigation, and anything I may decide on this summons cannot affect that company. It appears, however, that the undated balance sheet of the company at 17th February, 1925, showed a nett gain of £2,082 1s 4d, and a dividend paid up to that period of £1,000 or 10 per cent., and a profit (including the proceeds of sale of the company's extra premises and machinery) of £4,484 3s 0d. A further balance sheet was made up to 1st September, 1926. This balance sheet includes no profit or loss on trading, for there was none, and is in reality a realization account and shows divisible assets amounting to £36,108 15s 2d after deducting an alleged dividend of 75 per cent., viz., £7,500 and £1,288 8s 9d for costs of realization. There is also a realization account made up to 27th February, 1926, shewing that the Gihon Estate moiety of machinery had been bought by the new company for £3,440 0s 0d, and the rest of the machinery and a school had realized £2,854 18s 2d, and that the costs of realization had amounted to £4,517 13s 4d, and that there was a nett profit on realization of £30,495 8s 5d. This realization account also includes a bonus to Mr. Parkes, Managing Director, of £400 for his services, to Mr. James Robinson of £100, all for services about to end, and a fee of £500 to the liquidator. The statement of affairs at 7th

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October, 1926, purports to show a balance available for distribution, after repayment of the paid up capital of £10,000, as £33,201 8s 0d.

We now, with this knowledge known to all the directors and shareholders, come to the meeting of directors of 7th October, 1926. Mr. Herbert Quin, Barrister, F.C.A., had been Secretary of the 1907 company, and after the offer of purchase was made became liquidator and for his services as liquidator during this year 1925 to 7th October, 1926, was paid a fee of £500. It is evident that no business except a winding up or realization business was carried on by the company from the 28th of April, 1925, to the present moment. I do not know if the dividend of £1,000 in the accounts of 17th February, 1926, or the dividend of 75 per cent. = £7,500 in the accounts of 1st September, 1926, were paid to the trustees of William Gihon's will or not, but it appears from the letter of 18th March, 1927, from Mr. Quin to the plaintiffs that a loan (?) of £50 per share was given to the shareholders between April, 1925, and March, 1927. At the meeting on 7th October, 1926, the chairman submitted the audited accounts from 1st January, 1925, to 17th February, 1926, and they were approved and signed. He also submitted the draft balance sheet of 1st September, 1926, and said they would further have to provide for liabilities, including the above bonuses of £400 and £100 and liquidation fee of £500, etc., making in all £3,176 13s 0d, and explained they had an available nett profit of £33,201 0s 0d, including the amounts realized for the sale of the entire business premises and machinery. It was then proposed and seconded that according to paragraph 128 of the company's Articles of Association the sum of £33,201 8s 0d be declared as nett profits available for dividend. This was carried, the plaintiff Mr. Niall Nelson dissenting.

Then it was proposed by Major King and seconded by Mr. Haughton that a dividend of 330 per cent. free of any income tax be recommended to the annual meeting. This meant a distribution of £33,000 as income of the company to 7th October, 1926. Then the annual meeting of the company was held on 7th October, 1926, and Mr. Quin was present. The accounts of 17th February, 1926, were adopted, including the 10 per cent. dividend, and of 1st

September, 1926, including the 75 per cent. dividend of £7,500, and the nett profit of £33,201 8s 0d was declared available for distribution, and it was proposed by Mr. Haughton and seconded by Major King that this dividend of £330 per cent. free of income tax be paid out of the amount declared by the directors to be available for that purpose. The plaintiff Mr. Niall Nelson proposed that the dividend be restricted to 70 per cent., but no one would second that, and the original proposal was carried. The chairman then explained that the realization of the Company's assets was being proceeded with and a meeting to pass a resolution for winding up would be necessary, and it was proposed and seconded and carried that the arrangements for that meeting should be left to the directors. It was then proposed that the £25,000 lent to the shareholders under authority of directors meeting of 9th April, 1926, be called in, in order that that sum might be applied to payment of the dividend declared, and this was agreed to.

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Above are the facts. Outside a court of law I cannot imagine any one thinking that this 330 per cent. dividend is annual income or profit of this Lisnafillan Bleaching Company. If when the agreement of 28th April, 1925, was completed on 1st July, 1925, the Company had passed a voluntary resolution for winding up, the whole of this £33,000 now proposed to be divided amongst the shareholders would have been nett assets of the company returnable to the shareholders in proportion to the shares held by each of them. I say nothing about the 10 per cent. dividend in the February 1926 accounts or about the 75 per cent. dividend in the 1st September 1926 accounts, all of which were adopted by the general meeting of the company on 7th October, 1926, as no question is asked about them in this summons. In my opinion the whole operations of this company from 1st July, 1925, were realization and liquidation and not trading or carrying on the business of the company authorized by their Memorandum of Association. Its objects were primarily to acquire the business premises, machinery, etc., in which William Gihon had been a partner and to carry on that or some similar business of bleaching, printing, or dyeing. The Company and the majority of its

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directors contend that so long as they preserve the original £10,000, the capital of the company, they can cease to carry on the business they were incorporated to carry on and sell and realize it all, and by not passing, or by postponing the passing, of a resolution to wind up the company they can continue to exercise the powers given them for the purpose of carrying on the business of the company and put into force article 127 which says "no dividend shall be payable except out of the profits of the company" and article 128 which says the declaration of the directors as to the amount of the nett profits of the company shall be conclusive" which apply to profits of the company while its business is being carried on, and not to the entire assets of the company after the company and its directors have determined to realize all its assets and wind it up. The cases relied on by Mr. Murphy relate to a profit made by a sale of part of a company's property in a year while the company still continues to carry on the business it has been incorporated to conduct. I can find no case where a limited company has been held entitled to realize its entire assets and after setting aside its nominal capital and paying its liabilities, to divide the surplus as income or profits under the guise of declaring a dividend. This in my judgment would be a fraud on the winding up provisions of the Companies Act. I also am of opinion that the directors were willing to aid the tenant for life under Mr. Gihon's will to acquire a great portion of what was really the capital of his estate under the guise of its being distributed as dividend, profit or income. This accounts for the loan of £50 a share being recalled and the deliberate postponement of the passing by the company of a resolution to wind up, after the directors and the company had decided to terminate their entire business, and to cease to earn any profit which could legitimately be available for distribution as dividend under the Articles of Agreement of the company, and when they had determined to realize the entire assets of the company.

I therefore answer the first question No, and the second question Yes, and the third question No; 3 (b) on these answers does not arise. I have already appointed William Beggs to represent all persons who are or may become

entitled in remainder to the defendant Mrs. King as life tenant of the settlement under Wm. Gihon's will. All parties must be paid their taxed costs of these proceedings out of the trust estate under Mr. Gihon's will, the plaintiffs' costs to be taxed as between solicitor and client.

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Solicitors for the trustees : *Robert H. Orr & Sons.*

Solicitors for the remainder-man : *Martin H. Turnbull & Co.*

Solicitors for the tenant for life : *Cunningham & Dickey*

J. McC.

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IN THE MATTER OF THE ESTATE OF

ALEXANDER BOYD, DECEASED.

BOYD AND OTHERS

v.

ARTHUR BOYD AND MARGARET JANE BOYD (1).

(1927. No. 190.)

*Will—Construction—Specific or Demonstrative Legacies.*

A.B. by his will directed that certain pecuniary legacies amounting in all to the sum of £710 should be paid "with and out of the proceeds" of the sale of his investments comprising stocks and shares. The investments realised the sum of £487 0s 4d. At the date when the will was made they were worth approximately the sum of £481 12s 6d. There was a further direction that the legacies were to be paid free of all Crown duties. The testator further dealt with the residue of his property item by item. On a summons raising the question whether the balance of the legacies was payable out of the general residue of the estate,

*Held*, by Wilson J., that the balance was not so payable and that as the fund specified by the testator for their payment was insufficient to pay them in full, they must abate rateably inter se.

SUMMONS for the determination of the following questions arising under the will of Alexander Boyd, deceased :

(1) Whether upon the true construction of the will of the deceased and in the events which have happened the several legacies bequeathed by the said will which are directed to be paid with and out of the proceeds of the sale of deceased's investments, comprising stocks and shares are paid in full.

(2) If payable in full, out of what fund same are payable.

Alexander Boyd, late of Greenmount, Knock, made his last will on the 3rd day of December, 1925. He died on the 19th day of July, 1926, and probate of the will was

(1) In the Chancery Division before Wilson J.

granted to the plaintiffs, who were the executors and trustees of the will, on the 13th day of December, 1926

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Under the will of the deceased he instructed his trustees to sell his investments, comprising stocks and shares, and with and out of the proceeds thereof he made certain bequests, which amounted to the sum of £710.

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These bequests included one of £100 to the defendant Arthur Boyd. The deceased's shares realized £487 0s 4d.

At the date when the will was made these investments were worth approximately the sum of £491 12s 6d, and would have been insufficient to pay these legacies in full.

In addition to the stocks and shares comprising deceased's investments he was possessed of property in Duncairn Gardens, Ilchester Street and St. Mary Street, Belfast, and two houses 14 and 16 Green Road, Knock.

The deceased directed his trustees to sell the property in Belfast and after payment of all Crown duties, debts, testamentary expenses and costs to invest the proceeds and hold same, and all the residue of his estate in trust for the defendant Margaret Jane Boyd for her life, expressing the wish that she should reside in 14 Green Road, Knock, so long as she desired to do so, and subject as aforesaid the deceased empowered his trustees to sell 14 and 16 Green Road, Knock.

The deceased directed his trustees upon the death of the said Margaret Jane Boyd to convert his estate into money, and out of the proceeds to pay certain further pecuniary legacies, bequeathing the residue to the Rev. Thomas Rodgers and Alfred John Boyd in equal shares as tenants in common.

The plaintiffs in view of the insufficient sum realized by the sale of the investments proposed that the various pecuniary legacies payable out of that fund should abate rateably inter se. The legatees objected, and claimed that the deficiency should be made good out of the general residue of the estate.

*Warnock*, for the plaintiffs, stated the facts, and argued:—

In all cases the intention of the testator is the guiding feature of interpretation. Here clearly these legacies are

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only given as a charge on a specified fund, *Raikes v. Raikes* (1), *Paget v. Huish* (2). The direction that the legacies are to be paid free of crown duties is not an indication that the testator intended they were to be paid in full whatever happened. The testator did everything he could to divide his estate into watertight compartments.

*Copeland* for the defendant Arthur Boyd, representing the other legatees :—

The direction that the legacies were to be paid free of crown duties is a clear unequivocal expression of the testator's desire that they were in all events to be paid in full, *Kenyon v. Walford* (3).

*MacDermott* for the defendant Margaret Jane Boyd :—

The testator has created a fund out of which these legacies are payable, but not merely primarily payable, *Jarman on Wills*, vol. II. p. 1070. In construing the will, the court is only entitled to look to the state of affairs existing at the testator's death, *Higgins v. Dawson* (4), *Wills Act*, 1837, s. 24.

The testator intended to provide a competence for his sister : he could not have done this if there was to be an indefinite charge on the residue.

WILSON J. : This summons was brought seeking answers to four questions arising in the administration of this estate. The plaintiffs are the executors of the deceased. The will is dated the 3rd day of December, 1925. The deceased died on the 19th day of July, 1926, and probate was granted to the executors on the 13th day of December, 1926.

The main question is whether on the true construction of the will certain pecuniary legacies are demonstrative or specific legacies. The defendant Arthur Boyd is one of these legatees and gets £100. The defendant Margaret Boyd is the residuary legatee for life under the will.

The total of these pecuniary legacies amount to £710, and the fund provided for their payment realized only £487 0s 4d.

(1) 45 Ch. Div. 66

(2) 1 H. & M. 663

(3) [1912] 1 Ch. 219 at p. 227

(4) [1901] A.C. 1

By the will the testator appointed the plaintiffs trustees and executors of his will and gave them £25 each for their trouble. He then directed his trustees to sell his investments, company stocks and shares and "with and out of the proceeds of the same" to pay these above-mentioned pecuniary legacies of £710. He then directed the aforesaid legacies to be paid free of all crown duties and that the receipt of the Treasurer of the charitable Societies should be a sufficient discharge to his trustees. He then directed the trustees to sell his property in Duncairn Gardens, Ilchester Street and St. Mary Street and after payment of all crown duties, debts, funeral and testamentary expenses and costs to invest the nett proceeds of such sale and to hold the same and the residue of his estate, including two houses in Green Road, Knock, on trust for the use of his sister, the defendant Margaret Jane Boyd, for life, giving her a right to live at 14 Green Road, Knock, as long as she wished, and then gave power to his trustees to sell all this property and invest the proceeds and power to make sub-grants and sub-leases, and pay the income to Margaret Jane Boyd, and after her death he directed the conversion of his estate into money and the payment of certain other pecuniary legacies, directing that all the aforesaid legacies be paid free of all crown duties and then left the residue of his estate to his two nephews, Rev. Thomas Rodgers and Alfred John Boyd.

The question is whether the testator intended by the words in this will that the first set of pecuniary legacies directed to be paid out of the proceeds of the testator's stocks and shares, should be paid in full out of the general residue, if that special fund proved insufficient to pay them in full. I have appointed Arthur Boyd to represent all these legatees. Were these legacies merely secured by the proceeds of the stocks and shares or were these proceeds the sole fund for their payment? It is said that the testator's stocks and shares were never at or since the date of his will sufficient to pay these legacies. I am of opinion that the words "and with and out of the proceeds of the same," *prima facie* mean that the proceeds of the stocks and shares were the sole portion of the testator's property out of which these legacies were to be paid. He specifically provides that all crown duties, debts, testamentary

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expenses and costs were to be paid out of the proceeds of the sale of certain specific property and after these payments (which do not include the legacies in dispute) the balance of that property was to go as stated in the will. He then deals with all the rest of his property meticulously and I can find nothing in the will suggesting that the legacies in dispute were to be paid by the residue of the estate if the fund named for their payment turned out insufficient, though words which might suggest that result are the words "I direct my aforesaid legacies to be paid free of all crown duties." This might suggest that as they were to be paid free of crown duties, they were to be paid in full in all events in the first instance out of this fund, the balance to come out of the residue.

Having regard to the rest of the will and to his meticulous disposition of all his property other than the proceeds of the stocks and shares and also the last set of pecuniary legacies which are to be paid out of the residuary estate after the death of Margaret Jane Boyd, I am of opinion that the above clause only meant that whatever was payable in respect of the legacies in dispute was to be paid free of crown duties; and the crown duties (but not the residue of these legacies) were thrown on the proceeds of the sale of the testator's Duncairn Gardens, Ilchester Street and St. Mary Street properties.

I am of opinion that these legacies in dispute must abate rateably inter se and the crown duties payable in respect of these abated legacies are payable out of the proceeds of the Duncairn Gardens, Ilchester Street and St. Mary Street properties, and save as aforesaid the residue of the testator's estate is not liable to pay these legacies in full and I answer the questions accordingly.

Solicitors for the plaintiffs : *Messrs. Cleaver & Fulton.*

Solicitor for the defendant Arthur Boyd : *Samuel Henry.*

Solicitor for the defendant Margaret Jane Boyd :  
*Thomas Brown.*

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Nov. 7

## STEELE v. GILLILAND.

(1927. No. 3.)

*Practice—Verdict for defendant—Perverse findings—Motion for new trial—Leave to amend notice by applying for judgment for plaintiff—Jurisdiction of Court of Appeal to enter judgment—Rules of Supreme Court (Ireland) Order lviii., r. 4.*

On appeal to the Court of Appeal by a plaintiff from a verdict and judgment for the defendant, the plaintiff asked that the findings of the jury and the judgment entered by the trial judge should be set aside and a new trial directed.

The plaintiff at the hearing asked for liberty to amend his notice of appeal by applying in the alternative for judgment with costs.

*Held*, by the Court of Appeal (Moore L.C.J. and Best L.J.), that being satisfied that the findings of a jury were against the evidence and the weight of evidence and such as no jury could reasonably find, the court was not bound to order a new trial, but under Order lviii., r. 4, might and ought to direct judgment to be entered for the party in whose favour the jury should have found.

APPEAL by the plaintiff from the verdict and judgment given at the trial of the action by Andrews L.J. with a special jury.

The action was brought by the executor of the last will of John Petticrew deceased, dated 23rd October, 1926, who died on 13th December, 1926. The defendant pleaded the usual defences, and sought to establish a previous will, dated 27th September, 1926.

The facts of the case, so far as material to this report, were shortly as follows:—The deceased, who was an auctioneer in the town of Ballymena, had made a will dated 27th September, 1926, of which the plaintiff was appointed executor. By it the testator bequeathed to the defendant who had been for many years his housekeeper, his house and furniture, and the sum of £2,000.

On 23rd October, 1926, John Adrain, the deceased's solicitor, and Dr. Evelyn, the deceased's doctor, saw him in his house. His solicitor, who had been informed by his own assistant, the plaintiff Steele, that the deceased

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wanted to have his will of the previous September altered, asked him if that were so. The deceased answered that it was, and that he wanted the defendant left out of his will, absolutely, because she had insulted all his friends who came to the house. During the conversation, according to Adrain's evidence, the deceased was in bed, he was in his usual condition of mind, and Adrain had no doubt of his being perfectly capable. The will had been prepared by Steele, before Adrain his solicitor had seen him. The will was read to him and he was asked, "Is that what you want done, and does the will carry out your wishes?" and he said it did. The deceased signed the will in the presence of Nurse Cartmill, the plaintiff Steele, and the solicitor, Adrain. All three of them signed in presence of each other. Adrain the solicitor stated in his evidence that he had no hesitation in saying that the deceased knew what he was doing.

A number of other witnesses were examined on behalf of the plaintiff, the effect of their evidence being that at the time of the execution of the second will the deceased was quite capable.

The defendant in her evidence stated that in October the deceased was not at all in his right mind as compared with what he was in September, and that he would ask her in the afternoon what she was doing in bed all day. He did not know the nurses attending him.

The action was tried before Andrews L.J. and a special jury at Belfast.

The jury found that the will of 23rd October, 1926, was executed pursuant to the statute, that the deceased at the time of the execution of this will was not of sound mind, memory, and understanding, and did not know and approve of the contents thereof; that the will of 27th September, 1926, was executed pursuant to the statute, that the deceased at the time of the execution of the will of 27th September, 1926, was of sound mind, memory, and understanding, that the deceased at the time of its execution knew and approved of the contents thereof, and that the will of 23rd October, 1926, did not revoke the will of 27th September, 1926.

After the jury had answered the questions put to them Andrews L.J. gave judgment for the defendant, but stated that he did not approve of the verdict of the jury. In his notes occurs the following passage: "I was surprised at, and disapprove of the verdict, as being in my opinion entirely against the weight of evidence and probably prompted by sympathy."

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*Megaw K.C.*, *Davison K.C.* and *M'Sparran* for the plaintiff:—

The testator came to the conclusion that the defendant had forfeited any rights that she had ever had. The question of sympathy should not have influenced the jury. We rely on *Aitken v. M'Mechan* (1) and *Solomon v. Bitton* (2). In *Aitken v. M'Mechan* (1) Lord Morris said at p. 316: "Their Lordships are not unmindful of the weight due to the verdict of the jury which should not be set aside merely because the judge is of opinion that if he were the jury he would have found the other way. Still it is by no means an immaterial circumstance that the learned Chief Justice who tried the case stated that he was not satisfied with the verdict, and that in his opinion it was wrong."

We submit that this verdict should be set aside as being entirely against the weight of evidence, and as perverse. The jury were so swayed by sympathy that they omitted altogether to consider what was the evidence. We ask the court to set aside the verdict of the jury on the ground stated in *Metropolitan Railway Co. v. Wright* (3). We ask the court to amend the notice of appeal by adding an alternative prayer that judgment be entered for the plaintiff.

As to the power of the Court of Appeal to enter judgment instead of ordering a new trial, we rely on *Allcock v. Hall* (4). There it was held that the Court of Appeal has jurisdiction on a motion for a new trial to direct judgment to be entered for either of the parties, instead of ordering a new trial. The words used by Lindley L.J. in *Allcock v. Hall* (4) at pp. 445-447 are of very great relevance to the present case.

(1) [1895] A.C. 310

(2) 8 Q.B.D. 176

(3) 11 A.C. 152

(4) [1891] 1 Q.B. 444

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In *William M'Evoy, Ltd., v. James Calder & Co., Ltd.* (1) Viscount Cave in his speech at p. 123 quoted with approval the speech of Lord Loreburn C. in *Paquin, Ltd. v. Beauclerk* (2), where he said "if the evidence be such that only one conclusion can properly be drawn, I agree that the court may enter judgment." We submit that the court has ample jurisdiction to enter judgment for the plaintiff.

*Williamson K.C.* and *MacDermott* for the defendant :—

Leave to amend should not be granted. No case has been cited in which this has been done in a probate suit. If the court gives leave to amend it should only be on very onerous terms. We rely on *Skeate v. Slaters, Limited* (3). We submit that if the Court of Appeal can order amendment, the trial judge should have directed it. If there was any evidence in favour of the defendant, can that evidence be disregarded? The question is, what might the jury have found? There should be no new trial, but if there is to be a new trial, the defendant ought to know on which of the answers to the questions to the jury this new trial is to be based. The findings should not be liable to be impeached in a new trial. No written instructions were taken for the second will. The plaintiff's evidence cannot be relied on. The evidence that the testator knew and approved of the second will is unsatisfactory. There is evidence on which the jury might have found in favour of the first will and consequently the onus is cast upon the person alleging its invalidity.

Probate suits are to be distinguished from other jury trials, in that the issues are specified beforehand. So long as the order stands, the questions must eventually be found by the jury. The plaintiff refrained from asking that judgment should be entered for him.

The jury did not act unreasonably in finding against the will of October, 1926. The defendant had been the testator's faithful servant since she was a young girl.

(1) 55 I.L. T.R. 121

(2) [1906] A.C. 148

(3) [1914] 2 K.B. 429

MOORE, L.C.J. : The notice of appeal in this case asks for an order that the findings of the special jury and the judgment entered by Andrews L.J. be set aside and a new trial directed.

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Counsel for the appellants seek liberty to amend the notice of appeal by adding to it an alternative prayer that judgment be entered for them with costs. On the facts of the case we think this is reasonable, and we give liberty accordingly.

This appeal is solely conversant with the answers of the jury to questions 2 and 3, namely, whether the deceased at the time of the execution of the alleged will of 23rd October, 1926, was of sound mind, memory, and understanding, and whether the deceased knew and approved of its contents.

The plaintiff has expressly abandoned his appeal with regard to the question of revocation of the will of 27th September, 1926, and has further abandoned his appeal from the findings relating to the earlier will. It is admitted by the plaintiff that the earlier will was properly executed, and in our opinion the question whether it was revoked or not is a matter for a court of construction, as there is no suggestion that revocation was brought about by tearing, burning, etc.

Speaking for myself, I am not prepared to say that there was no evidence to go to the jury. But I am perfectly satisfied that the findings of the jury were against the evidence and the weight of evidence, and were such as no jury could reasonably find. The whole of the evidence is practically one way.

[His Lordship, having reviewed the evidence, proceeded]

If at the end of all that evidence, the plaintiff had asked the jury for a verdict in his favour, can there be any doubt what their answer would have been? I think the jury answered the questions as they did, because the defendant came into the box and made a pitiful case as to length of service. In addition, she said that in "October the testator was not at all in right mind as compared with what he was in September. He would ask me in afternoon what I was doing in bed all day. He did not know the nurses attending him." What is there in that to

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contradict the volume of evidence given on behalf of the plaintiff? No jury could act on the evidence of the defendant that in October the deceased was not mentally fit so as to set aside the evidence adduced by the plaintiff.

We allow the appeal and set aside the answers of the jury to questions 2 and 3, as being against the weight of evidence. We decline to give any answer to question 7, as this question raises a point of construction.

BEST, L.J. : I am clearly of opinion that the evidence was all the one way, and that the findings of the jury were against the evidence and the weight of evidence. It is our clear duty in the circumstances not to send this case for a new trial, but to enter judgment for the plaintiff.

Solicitor for the plaintiff : *John Adrain.*

Solicitor for the defendant : *J. A. M. Steele.*

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[IN THE COURT OF APPEAL.]

## DRURY v. JOHNSTON.

*Landlord and Tenant—Recovery of possession—Notice to quit—Tenant holding over—Statutory tenant—Right of statutory tenant's executors to retain possession—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12 (1) (f).*

The plaintiff was the owner of a dwelling-house subject to the provisions of the increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The defendants were the executors of E. W., who at the time of her death held the house as a weekly tenant. In 1920 a valid notice to quit was served on the tenant, and after it had expired the tenant remained on in possession, by virtue of the provisions of the Act of 1920. About two years before her death the defendants came to live in the house with the tenant at her request. Neither of the defendants was in any way related to the tenant, and they were at no time sub-tenants. Afterwards defendants requested the plaintiff's agent to transfer the tenancy to them, but this request was refused. The tenant died on 13th December, 1926, having by her will appointed the defendants as her executors. The defendants were the only beneficiaries named in the will, which did not specifically dispose of any interest in the house. After the death of the tenant the defendants continued to reside in the house. The landlord instituted ejectment proceedings against both defendants, who claimed the protection of the Increase of Rent Restrictions Acts. Section 12 (1) (f) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides that the expression tenant includes "any person from time to time deriving title under the original tenant."

*Held*, by the Court of Appeal (Moore L.C.J. and Andrews L.J.) that the tenant's rights under the Act were altogether personal, and that no interest in her tenancy could devolve on the defendants as her executors. *Keeves v. Dean* [1924] 1 K.B. 685 followed.

CASE stated by Best L.J. on appeal from a dismiss pronounced by the Recorder of Belfast, which set out that the plaintiff's civil bill, dated the 17th day of January, 1927, was a process for ejectment on the title and sought possession of the house and premises known as No. 27 Moneyrea Street in the city of Belfast.

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The material facts were not in dispute, and as found by the Lord Justice were as follows :—

The plaintiff is the owner of the said house. The defendants are the executors of a Miss Edith Weir who at the time of her death hereinafter mentioned held the house as a weekly tenant at the weekly rent of 7/-.

This tenancy had originated many years previous to 1920, but the house was a dwelling-house subject to the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and in 1920 a valid notice to quit was served on the tenant and the weekly rent was thereafter duly increased by the amounts authorised by the said Act. After the expiration of the said notice to quit the tenant remained on in possession under the protection and by virtue of the provisions of the said Act, that is, as a statutory tenant, and it was admitted before me that Miss Weir at her death was such a statutory tenant.

It was a term of the tenancy that the said Edith Weir should not underlet, assign, or part with possession of the house, without the written consent of her landlord or his agent.

About two years before the date of her death the defendants, who are husband and wife, came to live with the said Edith Weir in the said house at her request. Neither of the defendants was in any way related to Miss Edith Weir and they were at no time sub-tenants.

After the defendants had come to live with her, Miss Weir requested the plaintiff's agent to transfer her tenancy to the defendants, but this request was refused.

Miss Weir made her last will on the 7th day of June, 1926, and thereby appointed the defendants to be her executors. The defendants are the only beneficiaries named in the will, which however does not specifically dispose of the said house or any interest therein.

On the 13th day of December, 1926, Miss Weir died, and on the 15th day of February, 1927, probate of her said will was granted to the defendant May Johnston forth of the Principal Registry reserving the right to probate of her co-executor, the other defendant. I refer to said grant of probate which is to be taken as incorporated with this case.

No notice to quit other than that already referred to was served in respect of the said premises and the ejectment proceedings were brought on the title, the annual value of the house being less than £30. The defendants have remained in possession of the said house since Miss Weir's death and are still in possession.

For the plaintiff it was contended that as Miss Weir was a statutory tenant at the time of her death, her rights under the said Act were altogether personal, and that no interest in her tenancy could devolve on the defendants as her executors.

For the defendants, it was contended that the tenancy, though statutory, was none the less transmissible to the personal representatives on death.

These facts appeared to me to raise an important question of law and upon the application of the plaintiff I agreed to state this case.

The question for the court is :—

Are the defendants on the facts as stated entitled to retain possession of the said premises?

If the answer is in the negative there will be a decree for possession with costs.

If the answer is in the affirmative the dismissal of the Recorder is to be affirmed with costs.

*MacDermott* for the plaintiff :—

The question to be decided is, can a statutory tenant dispose of his tenancy by will. The original tenancy has long ceased to exist, and the present tenancy is statutory. A statutory tenant is one who holds not by virtue of an agreement, but by virtue of an Act of Parliament. As Bankes L.J. said in *Keeves v. Dean* (1), at p. 690, “ he is not a tenant at all, although he cannot be turned out of possession so long as he complies with the provisions of the statute, he has no estate or interest in the premises such as a tenant has. His right is a purely personal one, and as such, unless the statute expressly authorizes him to pass it on to another person, must cease the moment he parts with the possession or dies.”

I rely on section 12 (1) (f) of the 1920 Act, and on *Keeves v. Dean* (1). It was never intended that a

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“ statutory ” tenant should have a right to assign to any one he pleased. Why should such a tenant have the right to assign by will, when it has been expressly held that there is no right of assignment inter vivos? *Keeveres v. Dean* (1). *Collis v. Flower* (2) does not apply, as in that case the tenancy was not statutory. Similarly in *Mellows v. Low* (3) the tenancy was not a statutory one. *Parkinson v. Noel* (4) merely decided that a statutory tenant has an interest which on his bankruptcy passes to his trustee in bankruptcy, which on disclaimer by the trustee ceases to exist.

[He also referred to *Salter v. Lask* (5) and *Hicks v. Scarsdale Brewery Co.* (6).]

*Porter and Bell* for the defendants :—

This is a continuing tenancy. Under section 15 of the 1920 Act the tenant had a right to retain possession. In *Foley v. Gallagher* (7) it was held that the word “ assignment,” in the 7 Geo. 4, c. 29, s. 3, the 2 Wm. 4, c. 17, s. 2, and the 23 and 24 Vict. c. 154, s. 10, comprises acts inter vivos only; and a disposition by devise is, therefore, not within the operation of any of these sections. There is nothing in the Rent Restrictions Acts to preclude a devise. We rely on section 12 (1) (f) of the 1920 Act, and on *Salter v. Lask* (5). The statutory tenancy was superimposed on an existing tenancy. There are cases in which a tenant may become a statutory tenant although no notice to quit has been served. The word “ tenancy ” should bear its ordinary meaning. The use of the words “ tenancy ” and “ tenant ” imply an estate, something more than a mere personal right. All the incidents of a tenancy should be held to apply in the present case. The tenant becomes a statutory tenant by virtue of the existence of a prior tenancy. In *Mellows v. Low* (3) M’Cardie J., discussing the meaning of the word “ includes ” in s. 12 (1) (g) of the 1920 Act, said :—“ In my view the word ‘ includes ’ as used in para. (g) is not a term of

(1) [1924] 1 K.B. 685

(2) [1921] 1 K.B. 409

(3) [1923] 1 K.B. 522

(4) [1923] 1 K.B. 117

(5) [1923] 2 K.B. 798

[1924] 1 K.B. 754

(6) [1924] W.N. 189

(7) 2 L.R.I. 35

limitation or precise definition; it means what it says—that it includes the matters thereafter mentioned; in other words, it is a word of enlargement rather than of restriction, and I am unable to hold that the language of para. (g) cuts down the provisions of para. (f).” We submit that the Rent Restriction Acts only apply to statutory tenants. The dicta in *Keeves v. Dean* (1) must be taken to refer to assignments inter vivos only. What the legislature was really aiming at was to preclude trafficking in these tenancies. The very words used in para. (f) cover the cases of executors and administrators. A tenancy constitutes property. If the arguments used on behalf of the plaintiff are correct, a widow would have no rights where a will had been made. We submit that the Act expressly contemplated the death of the tenant. The words of para. (f) are quite sufficient for the defendants. In *Mellows v. Low* (2) an administratrix, though not in possession of the premises, was held to be protected by the Act which expressly describes the statutory tenant as a “tenant.” Bankes L.J., when he said in *Keeves v. Dean* (1), at p. 690, that he was “not a tenant at all,” was quarrelling with the Act. The tenant has something more than a mere status of irremovability. We suggest that the word tenant as used in the Act means statutory tenant.

[They also referred to *Chiverton v. Ede* (3) and *Dowling v. Butler* (4).]

*MacDermott* (in reply):—

In *Mellows v. Low* (2) the court held that para. (f) applied to a person who was not a statutory tenant.

MOORE, L.C.J., having stated the facts, said: We think the defendants are not entitled to retain possession of the premises.

The question is, was the tenancy a transmissible interest, or was it not? (His Lordship then read Sub-section (1) (f) of Section 12 of the Increase of Rent Act, 1920, and continued.) The question is, does the defendant May Johnston come within the provisions of this

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(1) [1924] 1 K.B. 685

(2) [1923] 1 K.B. 522

(3) [1921] 2 K.B. 30

(4) 54 I.L.T.R. 199

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sub-section. At the time of Miss Weir's death, this holding was a statutory tenancy. As to the meaning of the expressions "statutory tenant" and "statutory tenancy" we follow *Keeves v. Dean* (1). In his judgment in that case, Bankes L.J. said at p. 690:—"The person who so seeks to assign has come to be known as a 'statutory tenant,' and I think it is a pity that that expression was ever introduced. It is really a misnomer, for he is not a tenant at all; although he cannot be turned out of possession so long as he complies with the provisions of the statute, he has no estate or interest in the premises such as a tenant has. His right is a purely personal one, and as such, unless the statute expressly authorizes him to pass it on to another person, must cease the moment he parts with the possession or dies." In the same case Lush J. said at pp. 697-8:—"When it is said that a person who, perhaps inaccurately, is called a statutory tenant can assign, one necessarily asks oneself what it is that he has got to assign. He has no estate in the premises, that has come to an end, and all that the statute has given him is a purely personal right to be free from disturbance by his landlord. It is a very valuable right, but it is personal to him. The fact that the right is only personal is, I think, apart from s. 15, shown by the whole scheme of the Act, and by s. 12, sub-section 1 (g). That sub-section provides for the case of a statutory tenant who dies intestate, and allows his widow, if she was residing with him at the time of his death, to continue in possession of the house, and if there was no widow, then a member of his family to be selected by the county court judge in default of agreement. That sub-section gives the position of statutory tenant to a particular defined person, the widow or selected member of the family, and it would seem strange that after the Legislature has defined the person who is to enjoy the protection of the statute that position of statutory tenant can be assigned to another." After the notice to quit had expired, there only remained the right to continue in possession of the premises. A statutory tenancy has none of the attributes of a tenancy. It is a mere personal licence and not a tenancy. If it were an interest in land, it could certainly be transferred.

I base my judgment on the proposition that there is no transmissible interest, and on Section 12 (1) (f) of the Increase of Rent Act, 1920, "The expressions ' landlord,' ' tenant,' ' mortgagee,' and ' mortgagor ' include any person from time to time deriving title under the original landlord, tenant, mortgagee, or mortgagor."

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Under the description of tenant in the same section (g) certain persons only are given a right of continuance in possession on the death of the intestate tenant, namely, the widow residing with the deceased at the time of his death, or, where the deceased left no widow or was a woman, then a member of the family as there provided. This protection is obviously given to this limited class on the basis that otherwise it could not be provided for since no transmissible interest would pass from the deceased intestate.

I think the question put should be answered, that defendants are not entitled to retain possession of the premises.

ANDREWS, L.J. : I agree with the decision of my Lord. and have nothing to add save that I entirely approve of the decision of the Court of Appeal in England in *Keeves v. Dean* (1). I further approve of the ground on which that decision arrived at, namely, that the right of a statutory tenant is a personal one. It is true that in giving judgment in that case Bankes L.J. reserved the question as to the right of a person who succeeds on the death of a statutory tenant; but it seems to me that, whilst the learned Lord Justice very properly refrained from expressing any concluded opinion upon a question which was not directly before him, the principle which underlies the decision in *Keeves v. Dean* (1) applies to and determines the present case.

Solicitor for the plaintiff : *James Boston*.

Solicitors for the defendants : *S. Ross & Co.*

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## O'REILLY v. DOHERTY.

*Negligence—Defective premises—Premises sub-let in apartments—Accident arising from defect—Personal injury to invitee of sub-tenant—Non-liability of landlord—Rent and Mortgage Interest Restriction Act (N.I.), 1925, 15 & 16 Geo. 5, c. 12. s. 8 (4).*

Premises the property of the defendant were let to W., who in turn let different portions in apartments to sub-tenants, including the upstairs room to D. The letting to W. was within the provisions of the Rent and Mortgage Interest Restriction Acts, N.I. 1925. Plaintiff, a district nurse, received a professional call to visit D. The plaintiff proceeded upstairs without mishap, but on descending, and whilst she took the last step on to the hall, the floor gave way and plaintiff received serious injuries in respect of which she obtained a decree for £100 damages from the Recorder of Londonderry.

On appeal to the Londonderry City Assizes it was

*Held* by Andrews L.J., reversing the decree, that the plaintiff could not succeed in contract on the statutory obligation to repair implied in the letting, as she was in no way party or privy to such letting; and further that she could not succeed in tort as the defendant owed no duty to the plaintiff, who was neither the defendant's invitee nor licensee and had not control of the premises, which was essential to the existence of liability.

APPEAL to the Londonderry City Assizes from a decree pronounced by the Recorder of Londonderry for £100 in a remitted action for damages for personal injuries.

The following statement of the facts is taken from the judgment of Andrews L.J. :—

The plaintiff, who is a dispensary and maternity nurse, received on 12th June, 1926, a professional call to go to a Mrs. Diamond, who resided in an upstairs front room in 37 Naylor's Row, Londonderry. These premises are the property of the defendant who had, however, let them to a man called Wray, and he in turn sub-let different portions of the house in apartments to sub-tenants, including the upstairs room to Mrs. Diamond.

On the day mentioned it was stated by the plaintiff that she found the front door open when she went to the house. She proceeded upstairs without mishap, but, on descending after paying her visit, and whilst taking the last step on to the floor of the hall, the floor gave way. To quote

her own words :—“ The place seemed to give way and I fell. My right leg went into the hole right up to the knee or above it. I hit something, I think it must have been the stairs, on my back above the kidneys.”

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It was established in evidence that this was not the first accident caused by the defective floor of this hall. Only two months before, in the previous April, a Corporation binman, when carrying out house refuse, went through the floor of what has been described as the back hall, but there was no division between the floors of the so-called back and front halls, and the point which broke with the binman was only some nine feet away from the part that gave way under the plaintiff's foot. The tenant Wray reported this accident at the office of O'Doherty, the landlord's agent, on 29th April. He further stated that at that time he complained of the state of the floor of the entire hall both front and back, the floor of the front hall being, as he described it, “ all cracked and springy.” On the defendant's behalf it was denied that any such complaint was made. The defendant also sought to establish, through his builder M'Court, that in the month of April, 1926, when doing small repairs to the roof, he discovered that the back hall was “ a little gone.” The builder said that he reported this to O'Doherty, on whose instructions he lifted the floor of the whole of the back hall and re-laid it with new boards. This, he maintained, was all done in the month of April, 1926. He further stated that at this time he examined the floor of the front hall, but saw no defect in it. It was, he declared, “ good and firm”; he admitted, however, on cross-examination that on examining the floor again after the plaintiff's accident, he discovered that “ the boards were worn through with age.” The evidence given by Wray and others on behalf of the plaintiff was to the effect that O'Doherty took no notice of the complaint, that the floor was temporarily patched in April with a bit of board by another sub-tenant Cullen, and that no repairs were done to the floor of the hall by M'Court, or by anyone on behalf of the defendant until after the plaintiff's accident.

*MacDermott* for the plaintiff.

*Murphy K.C.* for the defendant.

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ANDREWS L.J. reserved his decision, and intimated that he would deliver a considered judgment in Belfast at the beginning of Michaelmas term.

His Lordship, having stated the facts as above set out, proceeded as follows :—The letting to Wray was within the provisions of the Rent and Mortgage Interest Restriction Acts; and, as the rent had been increased by the maximum amount permitted by Section 2 (1) (d) of the Act of 1920, it is admitted that under Section 8 (4) of the Act of 1925 the legal responsibility for keeping the house in a reasonable state of repair rested on the defendant.

The plaintiff's injuries to her kidneys, knee, leg, and teeth, and her subsequent heart trouble, were in my opinion moderately estimated at the now agreed upon sum of £100.

I accept the evidence of plaintiff's witnesses as much the more reliable, and it is sufficient to say that on the whole evidence I am satisfied that in the month of April, 1926, the defendant had, through his agent, notice of the defective state of the hall floor, and that he took no reasonable, proper, or adequate steps to have it repaired or renewed before the accident to the plaintiff.

On all material issues of fact, therefore, my findings are in favour of the plaintiff; and I do not attempt to conceal the fact that, having regard to the character of the evidence adduced on behalf of the defendant, I would be glad if I could find that the law applicable to the case permitted me to affirm the decree of the learned Recorder; but having given most careful consideration to numerous authorities, which I have read and re-read with the utmost care, I have reluctantly come to the conclusion that I must dismiss the plaintiff's claim. I shall state my views as concisely as I can.

In the first place I am clearly of opinion that the plaintiff cannot succeed in contract on the obligation to repair as she is in no way party or privy to it. Wray, the tenant, is the only person who could claim direct benefit thereunder. Thus in the well-known case of *Cavalier v. Pope* (1), where the tenant succeeded in obtaining a verdict from the jury and an unappealed-from judgment in con-

tract from the trial judge, the tenant's wife failed in contract and also, I may incidentally add, in tort. Lord Buckmaster, dealing with this branch of the law in *Fairman v. Perpetual Investment Building Society* (1) states at p. 81 that the proposition that contractual obligations between the landlord and tenant give no rise to claims by third parties is old and well-established law and its application is illustrated by the case of *Cavalier v. Pope* (2).

It occurred to me whilst I have been considering the case that it might possibly be urged that, as the obligation to repair arises in the present case, not under a covenant in a lease, but under public statute (Act of 1925, Section 8 (4)), benefit thereunder might be claimed by persons other than the tenant; but I am satisfied that such an argument could not be sustained for two reasons. The first is the special wording of the section, which, after deeming the landlord to be responsible for keeping the house in repair, adds the words "as if he had entered into an express covenant in that behalf." The statutory obligation can, therefore, have no wider application than would a covenant in the lease. The second reason is that the point must be taken to have been ruled upon by the English Court of Appeal in *Ryall v. Kidwell & Son* (3), in which it was contended for the plaintiff that the case was distinguishable in principle from *Cavalier v. Pope* (2) on the ground that the obligation, which there was to keep the house reasonably fit for human habitation, arose under a section of the Housing and Town Planning Act, 1909. The court, however, held that the effect of this enactment was merely to impart into the contract of tenancy an implied undertaking by the landlord towards the tenant alone that the demised premises should be reasonably fit for human habitation, and that a stranger to the contract of tenancy had no remedy for a breach of this implied undertaking. The court drew a distinction between such an obligation which was purely contractual and a duty such as is imposed by the Factory and Workshop Act, 1901, upon an employer to keep his premises in a fit state of fencing or protected and guarded. This case was sub-

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(1) [1923] A.C. 74

(2) [1906] A.C. 478

(3) [1904] 3 K.B. 135

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sequently referred to with approval by the Court of Appeal in England in *Dobson v. Horsley* (1).

As the defendant owed no contractual duty to the plaintiff it becomes necessary to consider whether he owed her any other legal duty. This, it will be found, involves a further inquiry as to the relationship in which the plaintiff stood to the defendant. The salient fact to be borne in mind in this connexion is that the defendant was the landlord of the premises and was in no sense in occupation of same; and in these circumstances it would be wholly irrelevant for me to consider what the plaintiff's rights would be were she suing an owner in occupation, especially as the law in such a case has been clearly defined in the classic judgment of Willes J., in *Indermaur v. Dames* (2), which has been adopted and followed in many subsequent cases.

In the present case I am unable to find the existence of any legal relationship between the plaintiff and the defendant. The plaintiff came on the premises as the invitee of Mrs. Diamond and her husband. This did not constitute her the licensee, much less the invitee, of the defendant. In certain cases no doubt an owner, though not in occupation, has been held liable in damages. Thus, legal responsibility has been held to attach to him where his omission to discharge some legal duty has resulted in the creation of a public nuisance from which the plaintiff has suffered special damage. *Payne v. Rogers* (3), and *Nelson v. The Liverpool Brewery Co.* (4). So also, though he has ceased to be in occupation, an owner of premises owes duties to adjoining neighbours for breach of which he can be mulcted in damages to one who has suffered consequential injury. It is also, I think, well established that a plaintiff may obtain damages against a landlord if in letting a house, say, in flats to tenants, he retains possession and control of a common staircase and exposes the invitee of one of his tenants to a concealed danger or trap on the staircase from which he suffers damage; for in such case the invitee of the tenant is, qua the staircase, the licensee of the landlord. The law on this subject was

(1) [1915] 1 K.B. 634 at p. 641

(2) 1, R. 1 C.P. 274

(3) 2 H. Bl. 350

(4) 2 C.P.D. 311.

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fully discussed in the House of Lords in the case of *Fairman v. Perpetual Investment Building Society* (1); and it was further considered by the Court of Appeal in England in the still more recent case of *Sutcliffe v. Clients Investment Company Ltd.* (2), where, on its special facts, the injured workman was held not to be merely a bare licensee of the defendant landlords but a licensee with an interest, who, accordingly, possessed the same rights as an invitee.

It is impossible, however, to apply the principle underlying the decisions in the above cases to the present. In most of the cases it is obvious that the facts are entirely different; and it is unnecessary for me to do more than refer to the judgment of Collins, M.R., in *Cavalier v. Pope* (3), where, after considering *Payne v. Rogers* (4) and *Nelson v. The Liverpool Brewery Co.* (5), he says:—"In all these cases there was a duty arising, as Lord Esher, M.R., put it, 'from proximity.' *Lane v. Cox* (6), *Le Lievre v. Gould* (7). They are, in fact, cases of nuisances adjoining places of passage or public highways. Can the analogy of these cases be applied where there is no public nuisance, but merely a defect in the interior of the house and an injury resulting therefrom to a member of the tenant's family? I think not. To hold otherwise would be to ignore the principle which limits the liability of occupiers towards licensees and guests to what has been described as setting a trap. If the view adopted by Phillimore J. was sound, it would only be necessary for such persons to prove that they had sustained damage from the dangerous condition of the premises, and that the person they sued was liable to repair them. But this is certainly not the law." This statement of the law was endorsed by the House of Lords.

In my opinion, however, the most conclusive argument against the plaintiff in the present case is that the defendant had not that control of the premises which is essential to the establishment of liability. Thus, to quote again

- |                                    |                                 |
|------------------------------------|---------------------------------|
| (1) [1923] A.C. 74                 | (4) 2 H.BL. 350                 |
| (2) [1924] 2 K.B. 746              | (5) 2 C.P.D. 311                |
| (3) [1905] 2 K.B. 757 at pp. 762-3 | (6) [1897] 1 Q.B. 415 at p. 417 |
| (7) [1893] 1 Q.B. 491 at p. 497    |                                 |

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from the judgment of Collins, M.R., in *Cavalier v. Pope* (1), "These cases rest on the principle that the person who has control of the premises is liable for the consequences of a nuisance. . . . The liability has never in any decided case that I am aware of been placed on any one who was not deemed to have control. And on p. 764, after referring to the contract by the landlord to do certain repairs, the learned Master of the Rolls says that he thinks that "the effect of this contract was not to put the landlord into the control of the premises so as to fix him with liability for a nuisance existing thereon." Dealing with the same point in the House of Lords, Lord James of Hereford said (at p. 431):—"Then all that remains on which to found liability is the contract, and it was urged that the contract to repair placed the premises constructively in the possession of the defendant and under his control. But the actual possession by the plaintiff seems to negative this constructive control." Lord Atkinson at p. 433 is to the like effect. He says:—"It was insisted upon by the appellant's counsel that the premises were under the control of the landlord because of his agreement to repair. I have been quite unable to follow the reasoning by which that conclusion has been arrived at. In *Miller v. Hancock* (2) and *Hargroves Aronson & Co. v. Hartopp* (3), the landlord was held liable because control was retained by him; but the power of control necessary to raise the duty, for a breach of which damages were recovered in the several cases to which we have been referred, implies something more than the right or liability to repair the premises. It implies the power and the right to admit people to the premises and to exclude people from them. But this power and this right belong to the tenant, not to the landlord, and the latter's contract to repair cannot transfer them to him. The existence of such an agreement may entitle a landlord to demand from his tenant admission to the premises for the servants and workmen required to carry out his contract, but nothing in the shape of control."

(1) [1905] 2 K.B. 757 at p. 762      (2) [1893] 2 Q.B. 177  
(3) [1905] 1 K.B. 472

Such is the law as it has been laid down by the highest tribunal, and as it must be interpreted by me. More than once its principles have been applied and its authority fully recognised by the Irish courts. Thus Ronan, L.J., in *Kelly v. Woolworth* (1), says:—"There is no doubt that the law casts a duty on the person in possession and occupation of premises to persons coming on the premises, either by his invitation express or implied, or with his permission, and that these duties are fixed by law alone, and arise from the possession and occupation." Again in the case of *Carroll v. Routledge* (2), in our own Court of Appeal, Sir Denis Henry C.J. cited and adopted the passage from Lord Atkinson's judgment as to the meaning of control which I have just quoted.

I therefore feel compelled, I repeat with the greatest reluctance, to reverse the decree of the learned Recorder; but, having regard to the wholly unreliable character of the evidence adduced on behalf of the defendant, I dismiss the plaintiff's claim without any costs either in the High Court, in the County Court, or on this appeal.

Solicitors for the plaintiff: *Hugh C. O'Doherty & Son.*  
Solicitor for the defendant: *Frederick G. Dickson.*

J. McC.

(1) [1922] 2 I.R. 5 at 5 p. 8      (2) [1925] N.I. 31 at p. 39

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BROWN. J.  
Nov. 24

## URQUHART v. STACEY AND OTHERS (1).

*Statements in Prospectus—Liability for—Companies (Consolidation) Act, 8 Edw. 7, c. 69, sec. 84—Offer for sale of Debentures.*

S. & Co. purchased an issue of £3,000,000 debentures from W. & C. and offered them for sale on the terms of a prospectus which was alleged by the plaintiff, a purchaser from S. & Co., to contain untrue statements.

*Held*, by Brown J., that the defendants, directors of W. & C., were not liable to compensate the plaintiff under sec. 84 of the Companies (Consolidation) Act, 1908, for loss sustained by him by reason of such untrue statement, that section being confined to prospectuses issued by or on behalf of the Company.

The action was brought by the holder of certain debentures in Workman, Clark & Co., Ltd. Debentures in the company to the amount of £3,000,000 nominal value were the subject of an agreement to purchase by Sperling & Co., an issuing house, who resold portion of the issue to the plaintiff on the terms of a prospectus held by the judge to have been issued by Sperling & Co. The portions of the said prospectus material to this report were as follows:—

"The Subscription List will open on Wednesday, the 11th day of February, 1920, and will close on or before Monday, the 16th day of February, 1920.

WORKMAN, CLARK & COMPANY, LIMITED,  
Offer for Sale

of £3,000,000 Seven per cent. Guaranteed First Mortgage Debenture Stock at 95 per cent., guaranteed as to principal and interest and premiums by the Northumberland Shipbuilding Company, Limited, and to be redeemed at 105 per cent. on or before February, 1940.

The London County Westminster & Parrs Bank, Limited, and Messrs. Kleinhort, Sons & Company, are authorised by the Purchasers, Messrs. Sperling & Company, to receive applications for the sale of £3,000,000 Seven per cent. Guaranteed First Mortgage Debenture Stock at the price of 95 per cent.

The Debenture Stock has been acquired by Messrs. Sperling & Company at the price at which it is now offered for sale, subject to the payment of a commission of 3 per cent. Out of this, Messrs. Sperling & Company are

paying an over-riding commission of  $\frac{1}{2}$  per cent. and an underwriting commission of 2 per cent. in respect of this offer, the Company defraying the other expenses, except brokerage.

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Trustees for the Debenture Stock:  
British, Canadian & General Investment Company, Limited.

Directors:

|                       |                            |                      |
|-----------------------|----------------------------|----------------------|
| The Earl of Drogheda. | Sir George S. Clark, Bart. | Sir E. Mackay Edgar, |
| F. Workman.           | R. A. Workman.             | Bart.                |
| George E. Clark.      | Sir John Esplen, K.B.E.    | Chas. E. Allan.      |
|                       | F. Rathbone."              | W. O. Workman.       |

An application form was supplied along with the prospectus and was filled and sent to Messrs. Sperling by the plaintiff. It contained the following words:—

"Gentlemen,

Having paid to your bankers the sum of £ , being a deposit of 5 per cent. on £ 7 per cent. Guaranteed First Mortgage Debenture Stock of the Company, applied for by me herewith, I request you to procure an allotment to me of that amount of Debenture Stock, upon the terms of the Prospectus containing your offer for sale . . . and I authorise you to cause me to be registered as the holder of the said Debenture Stock."

In response to this application £200 of the Debenture Stock was allotted to the plaintiff, who subsequently instituted this action claiming inter alia, compensation for loss sustained by him by reason of untrue statements contained in the prospectus.

At the trial the judge held that there was evidence to go to the jury on the question whether the impugned statements were untrue.

At the date of the issue of the "prospectus" and at the time of the allotment to the plaintiff, the defendants Sir George Clark, C. E. Allan, G. E. Clark, R. A. Workman, Sir E. Mackay Edgar and Sir John Esplen were directors of the Company.

The plaintiff having given evidence in support of the allegations contained in the statement of claim,

Counsel for the several defendant directors submitted that this prospectus was not within section 84 of the Companies (Consolidation) Act, 1908.

A. B. Babington K.C. (Attorney-General for Northern Ireland) (Monroe K.C., Robb K.C., and Warnock with him) for C. E. Allan, one of the defendants:—

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Sections 81 to 84 of the Companies (Consolidation) Act, 1908, form a code dealing with prospectuses. Sections 81 to 83 deal expressly with prospectuses issued on behalf of a company. We submit that section 84 also can only apply to such prospectuses. A prospectus is defined in section 285: "Prospectus means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company." I call your Lordship's attention to those words, "subscription or purchase," making it quite clear in the definition that there are two classes of prospectus, one which offers to the public shares or debentures for subscription, which naturally means one issued by or on behalf of a company; and one which issues shares or debentures for purchase which may or may not be by or on behalf of a company. Now turning back to section 84, "where a prospectus invites persons to subscribe for shares in or debentures of a company," we submit that the use of the word "subscribe" as qualifying the word "prospectus" in section 84 shows that it refers to one of those documents which is issued by or on behalf of a company, and not one of those documents which may be issued by or on behalf of somebody else, namely, an invitation to purchase as distinguished from an invitation to subscribe. In this particular case on the face of the document itself, it is an offer for sale, and your Lordship has already determined so far as that sale was concerned that there was a sale to Sperling. Consider for a moment what the effect would be if your Lordship were to read the word "prospectus" in sub-section 1 of section 84 as applying both to a prospectus inviting subscriptions and to a prospectus in the nature of an offer for sale made by some person who is not a director. The effect of it would be this, that though a director would be taken out of sub-section 1 by sub-section 2 in cases where it was an offer made by and on behalf of the company, he would not be protected in the cases where the prospectus is issued not in the name of and on behalf of the company, but by and on behalf of the purchaser of the debentures, as in this case. That is to say, he is made responsible in cases where it was issued by and behalf of

his own company, where presumably he would have some say as to the form of the prospectus, and as to the statements and representations contained in it; but where it was issued by some person to whom his company had sold the debenture issue, he would not be protected, for he would in that case have no control over the statements in the prospectus.

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*Whitaker K.C.* (*Ellison* with him) for Sir Edward Mackay Edgar,

*M'Gonigal K.C.* (*Ellison* with him) for R. A. Workman,

*Pringle K.C.* (*Black* with him) for Sir George Clark and G. E. Clark,

*Beattie K.C.* (*M'Kean* with him) for Sir John Esplen, adopted and relied upon the arguments submitted by Mr. Babington.

*Overend K.C.* and *Murphy K.C.* (*Lowry K.C.* and *Russell* with them) for the plaintiff:—

There is no doubt that the definition of "prospectus" in section 285 would cover a wider field than the word "prospectus" in section 84, and we are prepared to go the length of agreeing that the limiting word is the word "subscribe." The real ground of distinction between "subscribe" and "purchase" is this: When you purchase you obtain a transfer from some person who is registered as a holder. When you subscribe you get an allotment from the company or an issue of debentures of the company direct to you as the first registered holder, and that is what has happened in this case. When a company is itself issuing, or when its agent is issuing, or when a sub-purchaser at the moment is obtaining subscriptions which will result in allotment by the company, at such time the whole transaction is in a position where it is subject to the control and power of the directors. Then it is a case of subscription and falls within the meaning of that section.

BROWN, J. : The question which arises here whether a prospectus of this nature comes within section 84 of the Companies (Consolidation) Act, 1908, does not seem to have ever been judiciously considered though the provisions of the section have been in operation since the pass-

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ing of the Directors Liability Act, 1890, that is for over 36 years.

The definition of a prospectus in section 285 of the Act of 1908 is very wide, and it is not disputed that it recognises the difference between an offer to the public for subscription and an offer to the public for purchase. It is urged by counsel for the defendant directors that section 84 contemplates only an offer by or on behalf of a company to the public of shares for subscription.

Mr. Murphy and Mr. Overend have contrasted the provisions of sections 80 and 81 which are limited in operation to prospectuses issued "by or on behalf of a company," with those of section 84 which contain no such express limitation, and ask me to draw the conclusion that section 84 is wider in its scope and includes a prospectus such as that before me.

In the absence of all judicial authority, there have been cited to me the opinions of several eminent text writers on this question, Sir Francis Beaufort Palmer and Mr. Gore Brown amongst others. The question is discussed in Palmer's *Company Precedents*, in Vol. I. at pp. 201 and 202, and in Vol. III. at pp. 434 et seq. In Vol. III., at p. 437, the following passage occurs:—The section "is confined to prospectuses issued by or on behalf of the company. If, for instance, the owners of debentures for £100,000 in a company offered such debentures for public subscription the section would not apply, and subscribers must still rely on the general law. The following points may be noted with reference to the Act:—

(1) The words 'has authorized the issue' in section 84 (1) of the Act have generally been considered to refer to the initial putting forth, and not to subsequent distribution of bankers, advertising agents and others."

This is an expression of opinion on the point here at issue, and later on the same learned author uses a phrase which struck me very forcibly, and that is:—The word "subscribe" means "apply for and accept any allotment from the company." (1) I have considered this passage very carefully and I think that the effect is that "subscribe" means applying directly to the company

and receiving from the company an allotment of shares or debentures, and in my opinion this is a correct description of the effect of the word "subscribe."

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Now what happened in this case? This is clearly an application to Messrs. Sperling & Company, and as I have said before, the evidence all points to Messrs. Sperling being the purchaser of these shares and not merely an "issuing house" for Messrs. Workman, Clark & Company, in which event a person applying to them for shares would be applying to Messrs. Workman, Clark & Company under a different name and the invitation issued by them would really be an invitation for subscription using different machinery.

But here, although the matter has been suggested as I have said, the only evidence in the case points to Messrs. Sperling being in fact the purchasers, and the contract made by the plaintiff is a contract with Messrs. Sperling, a direct contract only with them, and I have come to the conclusion that the application on behalf of the defendant directors must be acceded to, and that there is no statutory liability on them under this section 84.

Solicitor for the plaintiff : *T. Erskine Alexander.*

Solicitors for the defendant C. E. Allan : *M'Lean & Son.*

Solicitors for the defendant Sir E. Mackay Edgar :  
*Messrs. Johns, Elliott & Johns.*

Solicitors for the defendant R. A. Workman : *Messrs. Johns, Elliott & Johns.*

Solicitor for the defendants Sir George Clark and G. E. Clark : *Robert Wallace.*

Solicitors for the defendant Sir John Esplen : *Messrs. Carson & M'Dowell.*

A. A. C.

[IN THE COURT OF APPEAL.] (1)

C. A.  
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Dec. 2ESTATE OF S., A PERSON OF UNSOUND MIND BY  
HIS COMMITTEE,AND IN THE MATTER OF THE  
TRUSTS OF THE WILL OF T.S. DECEASED.*Lunacy jurisdiction—"Ordinarily resident"—Land Purchase  
(Northern Ireland) Order, 1923, section 8 (2).*

S., a person of unsound mind, had lived abroad for a great number of years. In May, 1922, he was by order of the Lord Chief Justice of Ireland brought from abroad and placed in a private asylum near Dublin. His domicile is in Northern Ireland and he has a family residence in County Tyrone. There was no evidence that S. had ever previously lived in the Irish Free State.

Funds the proceeds of sale through the Irish Land Commission of portion of the estates to which S. was entitled as tenant in tail in possession, were by orders made between 1912 and 1922 duly vested in the Public Trustee Ireland, appointed under section 52 (10) of the Irish Land Act, 1903, trustee of the settlement made by the will, dated 24th December, 1850, of T. S., deceased.

By Order in Council, dated May 25th, 1923, the Land Purchase Commission, Northern Ireland, was established, and the office of Land Purchase Trustee for Northern Ireland was created. In purported pursuance of the provisions of that order the Public Trustee Ireland transferred to the Land Purchase Trustee for Northern Ireland the funds in his name subject to the trusts of the settlement.

Section 8 (2) of this Order provides that where the Public Trustee for Ireland was on 31st March, 1923, trustee of a settlement of land in Northern Ireland, his interest in the funds represented by the sale of such lands should be transferred to the Land Purchase Trustee for Northern Ireland, except when the income of the investment on that date was payable to a person "ordinarily resident" in the Irish Free State.

On an application made on behalf of the Committee of S. and the Public Trustee Ireland for an order that the Land Purchase Trustee for Northern Ireland should transfer and pay to the Public Trustee Ireland all funds under his control which form part of the estates of S. The Northern Ireland Public Trustee declined to transfer the fund without the sanction of the court under rule 26 of the Public Trustee Rules, 1904. Andrews L.J., sitting as Judicial Commissioner, refused his sanction to the transfer.

*Held* by the Court of Appeal (Moore L.C.J. and Best L.J.), affirming the decision of Andrews L.J., sitting as Judicial Commissioner, that on the day of transfer S. was not "ordinarily resident" in the Irish Free State, and that the application must be refused. In *Re Murtha* (44 I.L.T.R. 114) and *R. on alleged lunatic* 46 I.L.T.R. 220 approved and followed.

(1) Before Moore L.C.J. and Best L.J.

APPEAL on behalf of S., a person of unsound mind, by his Committee and the Public Trustee for Ireland from an order made by Andrews L.J. (sitting as Judicial Commissioner) refusing to sanction a transfer by the Public Trustee Northern Ireland to the Public Trustee, Ireland, of funds the property of S.

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By Order in Council dated 25th May, 1923 (1) the Land Purchase Commission Northern Ireland was established and the office of Land Purchase Public Trustee created with like powers and duties as the Public Trustee under section 39 of the Irish Land Act, 1903.

Rule 26 of the Public Trustee Rules, 1904 (2) provides that "stocks, shares and securities vested in or standing in the sole name of the Public Trustee shall not be dealt with save with the sanction of the court unless the object of such transfer is recorded in a minute," etc.

The following statement of the facts is taken from the judgment of Andrews L.J. :—

The Land Purchase Trustee for Northern Ireland had under his control funds forming part of the estates of S., the proceeds of sale through the Irish Land Commission of portion of the estates situate in the counties of Londonderry and Tyrone to which S. was entitled as tenant in tail in possession, of a total approximate value of £10,000, which were by orders of the Irish Land Commission made between the years 1912 and 1922 duly vested in the Public Trustee Ireland. appointed under section 52 (10) of the Irish Land Act, 1903 to be trustee of the settlement made by the will of T.S. By Order in Council, dated 25th May, 1923, the Land Purchase Commission Northern Ireland was established, and the office of Land Purchase Trustee for Northern Ireland was created, and in purported pursuance of that order the Public Trustee Ireland transferred to the and Purchase Trustee for Northern Ireland the funds in his name subject to the trusts of the settlement. The funds have since been retained and administered by the Land Purchase Trustee for Northern Ireland who has paid the income to the committee and receiver over the estates of S. appointed by the Lord Chancellor of Ireland.

(1) Imp. S. R. & O. 1923 No. 615 p 727. (2) Imp. S. R. & O. 1904 No. 1747, see Maxwell Irish Land Acts, 1903 to 1909 p 1404.

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Section 8 (2) of the Land Purchase Northern Ireland Order, 1923, provided that where the public trustee is on the day of transfer (i.e. 31st March, 1923) trustee of a settlement, if the settled land in consequence of the sale of which the public trustee was appointed trustee of the settlement, was land in Northern Ireland, then the Land Purchase Trustee for Northern Ireland should become trustee of the settlement in his stead, provided that if the income of the investments representing such settled land or any part of that income is at the day of transfer payable to a person "ordinarily resident" in the Irish Free State, the Land Purchase Trustee for Northern Ireland should not become trustee of the settlement unless and until he is appointed trustee by a court competent to appoint new trustees of the settlement.

The material facts on the question of the residence of S. were that by permission of the Lord Chancellor of Ireland, who had taken charge of him under the sign manual as a person of unsound mind, S. lived in Belgium for a great number of years, from about 1868 until the German invasion in 1914, when he was removed to Holland, where he remained until May, 1922. He was then brought over to Ireland and placed in a private asylum in County of Dublin, where he has since remained.

*Davison K.C.* (with him *Binchy*) for the appellants :—

The Order in Council gives rise to the difficulty. The lunatic is detained in the Irish Free State and the Committee is resident in Northern Ireland. I submit that the jurisdiction of the court cannot depend on the residence of the committee. Everything depends on who is the trustee of the settlement. The whole of the land represented by these funds is situate in Northern Ireland. If these funds have been transferred by mistake to the Land Purchase Trustee for Northern Ireland he should re-transfer them to the Public Trustee, Ireland. It is immaterial where the committee resides. The committee is simply the agent of the lunatic. It would be absurd to contend that these funds are not the property of S.

In this case everything depends upon the interpretation of the words "ordinarily resident." A man's residence

can be changed in a moment. This unfortunate man's only residence is in the Irish Free State.

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In Dicey Conflict of Laws (1896 edition) p. 245 a distinction is drawn between change of residence and change of domicile.

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The lunatic is the person to whom this money is payable and the Public Trustee for Ireland still remains trustee by reason of the exception contained in Section 8 (2) of the Land Purchase (Northern Ireland) Order, 1923.

The case of *In Re De Larragoiti* (A Person of Unsound Mind) (1) should be followed.

*Monroe K.C.* and *Dougherty* for the Land Purchase Trustee for Northern Ireland :—

This is the case of a Northern Ireland lunatic. His committee resides in Northern Ireland.

We submit that the words “ordinarily resident” have no meaning as applied to a lunatic. These words apply to his committee but not to the lunatic.

*Davison K.C.* (in reply) :—

The words “ordinarily” means “habitually.” S. must have a residence, whether he is, or is not, a lunatic. Ordinary residence means habitual place of abode.

*Cur. adv. vult.*

MOORE, L.C.J. : I adopt the statement of the facts of this case as set out by Andrews L.J.

I think the question will have to be decided on the terms of the order of May 25th, 1923. Section 8 (2). Prima facie, where the Public Trustee for Ireland was on the 31st March, 1923, trustee of a settlement which was a settlement of land in Northern Ireland, then his interest in the funds represented by the sale of such lands is transferred to the Land Purchase Trustee for Northern Ireland, except in the case when the income of the investments is on that date payable to a person ordinarily resident in the Irish Free State.

I am satisfied that S. is the person to whom the income of the investments was payable on March 31st within the

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meaning of the order, even though it was in fact received for him by his committee, who is also receiver in the lunacy matter. I think the residence of his committee no more material than if he were the donee of a power of attorney.

It therefore lies on the person asserting that the Land Purchase Trustee has no title to these funds to satisfy this court that S. was on March 31st, 1923, "ordinarily resident" in the Free State within the meaning of the Order in Council.

It appears that in the month of May, 1922, S., who was a lunatic so found, was by order of the Lord Chief Justice of Ireland brought from abroad and placed in a private asylum near Dublin. It does not appear that he had ever before lived in the Free State. It does appear that his domicile is in Northern Ireland and that he has a family residence in County Tyrone. He was on the day of transfer detained in this asylum. The period of detention would naturally depend upon the state of his health; it was enough to say that presumably his detention was warranted for the ten months prior to the day of transfer. We cannot look to what has happened since, as that is the crucial date by which his rights are to be determined. I think he was then living in the Free State, but can it be said that he was "ordinarily resident" there? I think "ordinarily" may fairly be interpreted to mean "as a general rule of life" resident in the Free State. I cannot hold that a prisoner in the Free State serving a term of imprisonment under restraint, though resident in the Free State, is ordinarily resident in the prison or even ordinarily resident in the Free State unless he has some other sort of fixed place of resort there. I do not think a domiciled English or Scottish prisoner in Dublin in these circumstances, with no local habitation outside the prison, for himself or his family, could be said to be ordinarily resident in the Free State even though so detained.

I cannot think that a lunatic detained under order of the Lord Chancellor for ten months in an asylum in the Free State is in any different position. I have not to decide where his ordinary residence may be, or whether in fact he can be said to have one at all or not, but I am

satisfied that on the day of transfer he was not "ordinarily resident" in the Free State, which is the only issue to be determined in the present case.

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I do not think that the question of the time or length of the residence is necessarily a determining factor in all cases, and in addition to the cases referred to by Andrews L.J. there is a recent case of *R. v. Lancashire JJ.* (1), decided under the Bastardy Laws Amendment Act, 1872, where it was held that the applicant's visit to the house of her sister for a month was a sufficient residence to entitle her to maintain an application for an affiliation order. Here there was no qualifying expression such as "ordinarily," the words upon which the decision went were "place in which she may reside."

The two cases referred to by Andrews, L.J., of *Chellev v. Brown* (2), and *Knight v. Ponsonby* (3) went on the question of how far the respective plaintiffs had such "a fixed" residence as exempted them from giving security for costs. I do not think that these are on all fours with the present case. The nearest authority I can find to the case before us is that of *R., an alleged lunatic*, decided by Dodd, J., on circuit (4).

Residence being necessary to found the County Court jurisdiction in Lunacy under 43 & 44 Vict., c. 39, sec. 2, where the word is simply "reside," Dodd, J., held (following *re Murtha* (5), a decision of Walker, C., that compulsory detention in an asylum is not such residence as to give jurisdiction. He says: "When a man is detained or compulsorily kept in jail or elsewhere he is not 'residing' there. The test is whether the detention is compulsory, not whether it is temporary."

*Murtha's case* (5) had previously come before Sir S. Walker as Chancellor, and he says at p. 114: "Residence does not mean compulsory residence as in jail." This case has an advantage over that of Dodd, J., inasmuch as it is not a circuit case but a decision under the lunacy jurisdiction of the Lord Chancellor.

(1) [1925] 1. K.B. 200

(2) [1923] 2 K.B. 844

(3) [1925] 1 K.B. 545

(4) 46 1 L.T.R. 220.

(5) 44. I.L.T.R. 114

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I may say that I had written the earlier part of this judgment before I discovered these Irish authorities, and am pleased to find that I am in complete agreement with them.

I follow them with respect and approbation. In my judgment the appeal fails, and I think the Public Trustee should pay to the Land Purchase Trustee of Northern Ireland his costs of this appeal, when taxed and ascertained. In all other respects the order of Andrews, L.J., will be affirmed.

BEST, L.J. : The question for decision in this case is whether on the 31st day of March, 1923, S., a person of unsound mind, was "ordinarily resident" in the Irish Free State. If he were at that date ordinarily resident in the Irish Free State the appeal must be allowed and the funds to the credit of the matter must be transferred to the Public Trustee, Ireland, and on the other hand if this Court should decide that he was not ordinarily resident in the Irish Free State on that date the funds are rightly held by the Land Purchase Trustee for Northern Ireland and the appeal must be disallowed.

The lunatic in this case had been confined in Belgium from 1868 to 1914, and on the invasion of that country by the Germans in the latter year he was transferred to an asylum in Holland. In the year 1922 by an order of the Lord Chief Justice of Ireland the lunatic was brought to, and placed in, a private asylum in the vicinity of Dublin. During all, or nearly all the years of his confinement he was, through his committee, receiving the rents and profits of the family property in County Tyrone, and the family seat has been, and still is being, kept up so that in case of recovery taking place S. may at any moment return to his ancestral home. In these circumstances can it be said that he has a residence in the Irish Free State? Adopting the definition of residence given by Bayley, J., in *Rex v. North Curry* (1), as the place where an individual eats, drinks and sleeps, or where his family and his servants eat, drink and sleep, it would seem to be the case that S. had a residence in the Irish Free State at the crucial date and possibly one also in Northern Ireland, if a lunatic can at all

be said to have a residence. But is he ordinarily resident in the Irish Free State or rather was he so on the 31st day of March, 1923? Ordinarily means in the ordinary course of events or normally, and I refuse to hold that a person who has been placed in an asylum in a country where he is not domiciled and in which he has no place of abode is in the ordinary course of events or normally residing in the country in which the asylum is situate.

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I think, therefore, that Lord Justice Andrews rightly decided this case and that the appeal should be dismissed with the consequences stated by my Lord.

Solicitors for the appellants : *French & French*.

Solicitors for the Land Purchase Trustee for Northern Ireland : *S. S. & E. Reeves & Sons*.

J. McC.

See *Levene v Commissioners of Inland Revenue* [1927] 2 K.B., p. 38.—Ed.

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[IN THE COURT OF APPEAL.]

## M'GUCKEN

v.

## KENNEDY, HAMILTON AND MORGAN.

*Negligence—Costs payable by plaintiff to successful defendant ordered to be added to costs recoverable by plaintiff from unsuccessful defendant.*

M'G. sued K. and also H. and M. for negligence in driving a motor car in which H. was driving and M. the owner was also travelling. K. was driving another motor car. The two cars collided. At the trial the real issue was whether or not K. and H. and M. were jointly to blame or if not jointly was any of them separately culpable. The jury found for M'G. as against H. and M. and also that H. was the servant of M. and awarded £25 damages. Moore L.C.J. gave judgment for M'G. for £25 damages and costs as against H. and M., and also entered judgment for K. with costs against M'G. On application it was ordered, following the form of order in *Henderson v. Martin and Barron* (1926, No. 4870), *Brown J.* (unreported) and *Blakely v. Tinsley and M'Causland* (1921, No. 262), *Wilson J.* (unreported), that the costs paid by M'G. to the successful defendant K. should be included in the costs recoverable by M'G. against H. and M.

On appeal taken by leave the Court of Appeal affirmed the judgment of Moore L.C.J.

In an action tried by the Lord Chief Justice and a special jury at Belfast for negligence in driving a motor car the following questions were left to the jury—with their answers :—

Was the defendant Kennedy's car in default at the time of the accident?—No.

Was the defendant Morgan's car in default at the time of the accident?—Yes.

Was Hamilton driving on behalf of Morgan?—Yes.

Damages £25 on these findings.

The judge gave judgment for the plaintiff M'Gucken against the defendants Hamilton and Morgan for the sum of twenty-five pounds with costs and gave judgment for the defendant Kennedy against the plaintiff with costs, and

being of opinion that the defendant Kennedy was introduced into the action solely by the false allegations of the defendants Hamilton and Morgan as to the responsibility of Kennedy for the accident, ordered that the plaintiff should have such costs, as were payable by him to the defendant Kennedy, over against the defendants Hamilton and Morgan, in addition to his costs of the action against them; and gave liberty to the said defendants to appeal against so much of the order as directed the payment by them of these costs.

The defendants Hamilton and Morgan separately appealed from the order to the Court of Appeal.

*Beattie K.C.* (with him *Warnock*), for the appellant Morgan, said he had come to the conclusion that the appeal could not be sustained.

*Williamson K.C.* (with him *Pringle K.C.* and *M'Coy*) for the respondents.

*Long* for the defendant Kennedy.

The Court of Appeal (1) affirmed the order of the Lord Chief Justice with costs.

Solicitor for the appellant : *S. J. Millar*.

Solicitors for the respondents : *Venables, Byers & Franck*.

Solicitors for Kennedy : *Caldwell & Robinson*.

*J. McC.*

(1) *Andrews and Best, L.JJ.*

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## COMMISSIONERS OF INLAND REVENUE

v.

### THE OLD BUSHMILLS DISTILLERY COMPANY, LIMITED (IN LIQUIDATION).

*Revenue—Corporation Profits Tax—Company in liquidation carrying on a trade—Realization sales incidental to winding up or profits arising from trading—Decision of Special Commissioners upon case stated—Appeal to Recorder—Effect of decision of Recorder—Finance Act, 1920 (10 & 11 Geo. 5, c. 18), part 5 s. 52 (1), (2), (3).*

The defendant company carried on a large distilling business. In July and August, 1920, the company passed resolutions for a voluntary winding up. The liquidator, with a view to realization, did some distilling, but no distilling was done after the end of the tax year 1920-21. In the tax year 1921-22 large sales of stock were effected. The company was assessed to Corporation Profits Tax in respect of the years 6th April, 1921—30th September, 1921, 1921-22, 1922-23, on the footing that the liquidator had carried on a trade in the years covered by these assessments.

On appeal the Special Commissioners confirmed the assessments. The defendant company appealed from this decision to the Recorder who discharged the assessments on the ground that the profits did not arise from the carrying on of a trade but from realization sales, and capital transactions, incidental to the winding up of the business.

*Held* by the King's Bench Division (Moore L.C.J. and Brown J.) that the Recorder having found as a fact that these were not ordinary trading sales, and that therefore the profits were not profits of trade, they could not overrule his decision.

CASE STATED under the Income Tax Act, 1918, section 149, and the Finance Act, 1920, section 56 (6) by the Recorder of Belfast for the opinion of the King's Bench Division of the High Court of Justice in Northern Ireland as follows :—

This matter came before me on 4th December, 1926, Limited, against a decision of the Commissioners for the special purposes of the Income Tax Acts, dated 4th November, 1926, confirming three assessments to Corporation Profits Tax dated 11th February, 1924, and made upon the Company by the Commissioners of Inland Revenue under the provisions of the Finance Act, 1920, Part v.

The three assessments were made in respect of the accounting periods—

1. 6th April—30th September, 1921.
2. 1st October, 1921—30th September, 1922.
3. 1st October, 1922—24th March, 1923.

The defendants are a limited company incorporated under the Companies Acts, 1862-1890, having their registered office in London, and carrying on the business of whisky distilling at the Old Bushmills Distillery and the Comber Distillery in Northern Ireland. The objects for which the company was formed set forth in its memorandum of association included amongst other matters the following, viz. : the carrying on in all their branches in any part of the world of the trades or business of wine and spirit merchants, rectifiers, compounders, distillers, etc., and to buy, sell, manipulate and deal (both wholesale and retail) in commodities of all kinds which can be conveniently dealt in by the company in connection with any of its objects. In February, 1920, the defendants received an offer to purchase all their fully paid ordinary shares at a price of £3 per share, which offer was shortly afterwards raised to £3 10s per share. This offer was not accepted, and at an extraordinary general meeting of the company held on 9th July, 1920, it was resolved to wind up the company voluntarily, and Mr. Thomas R. Burns was duly appointed liquidator. This resolution was confirmed on 5th August, 1920. In pursuance of this resolution the Comber Distillery was sold on 31st December, 1920, in its entirety with a portion of its stock. Owing to difficulties of title, and pending negotiations for the purchase of additional lands, the Old Bushmills Distillery was not put up for sale until March, 1921, when no offer of purchase was received. In the meantime in order that he might be in a position to offer the Old Bushmills Distillery as a going concern, and knowing that the value of the assets would be depreciated if the distillery were closed, the liquidator, on behalf of the company, in addition to selling existing stocks, continued distilling operations, though on a reduced scale, up to March 31st, 1921. No whisky was distilled after that date.

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From the time of his appointment the liquidator endeavoured to dispose of the stocks of whisky belonging to the company, but the difficulty of finding purchasers at any given time for more than a limited quantity of one brand of Irish whisky caused the realization of the stocks of whisky to extend over a period of about two and a half years. The liquidator continued to realize the stocks of whisky with all possible expedition and finally concluded his realization of the stocks by a sale on 24th March, 1923, to a firm of wholesale whisky merchants in Belfast of the whisky still remaining unsold. At the date of the commencement of the liquidation the Company's stock of whisky was approximately 500,000 gallons, and at the date of the final sale it did not exceed 50,000 gallons. Before the liquidation the company had been accustomed to sell the greater part of their whisky as bottled whisky, but after the liquidation the greater part of the whisky in stock was sold as bulk whisky in bond.

For the purpose of rendering certain portions of the stocks of whisky saleable it was necessary for the liquidator to purchase some whisky for blending purposes, but such purchases were made solely for the purpose of rendering the company's assets saleable. It was also necessary for the purpose of some of the sales of whisky which he effected, for the liquidator to purchase bottles and cases and to incur certain general expenses.

As the realizations of the stocks of whisky proceeded, the liquidator in addition to discharging the other liabilities of the company, redeemed the debentures issued by the company, returned to the preference shareholders their share capital in full, and made several repayments of capital to the ordinary shareholders.

The above-mentioned assessments to Corporation Profits Tax were made in respect of the profits arising from the aforesaid sales of whisky by the liquidator during the said accounting periods. No assessment to Corporation Profits Tax was made in respect of the period from 5th August, 1920 to 5th April, 1921, and no Corporation Profits Tax was paid for this period, but the crown state that they do not admit that no liability exists in respect of this period.

On the above facts which are not in dispute it was contended for the company that the sales of whisky during the accounting periods in respect of which the assessments to Corporation Profits Tax were made were realization sales of the company's assets, incidental to the winding up of the company's business and were capital transactions not giving rise to any liability to Corporation Profits Tax in respect of the profits arising therefrom.

On behalf of the Commissioners of Inland Revenue it was contended that the liquidator as agent for the company had carried on a trade continuously through the said periods and that the profits arising from the sales were profits arising from the carrying on of that trade, and that the company was liable to assessment to Corporation Profits Tax in respect of the said profits.

Upon consideration of the above facts and the arguments addressed to me I found as a fact that the profits during the periods in question in respect of which the three assessments appealed from were made did not arise from the carrying on of the trade of the appellants but from realization sales, and capital transactions incidental to the winding up of the business, and I accordingly discharged the said three assessments.

The representative of the crown immediately upon my determination of the appeal, declared to me his dissatisfaction therewith as being erroneous in point of law, and in due course required me to state a case for the opinion of the High Court pursuant to the Income Tax Act, 1918, section 149, and the Finance Act, 1920, section 56 (6).

The question for the court is whether I was justified in discharging the said assessments or whether I was bound to hold as a matter of law that the company was liable, and if so to what extent, to assessments to Corporation Profits Tax in respect of the profits arising from the said sales of whisky effected by the liquidator in the course of the winding up of the company during the said three accounting periods.

*Davison K.C.* and *Dougherty* for the Commissioners of Inland Revenue :—

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We submit that the finding of the learned Recorder is a finding on a question of law. The facts amounted in law to trading or carrying on a business. This company was carrying on the business of selling whisky, which was their stock in trade. We rely on *South Behar Railway Company v. Inland Revenue Commissioners* (1), and especially upon the speech of Viscount Cave C., at p. 483. In *Doughty v. Commissioners of Taxes* (2), Lord Phillimore in delivering the judgment of the Privy Council said, at p. 209: "In the view of the court, it did not make any difference whether the stock in trade was sold progressively or all at once by way of clearing sale or otherwise in connexion with a transfer or a winding up of the business. Whether his profit was derived from a single sale of all his stock in trade at once, or from repeated sales in the ordinary way of his business, his profit was taxable income, and was assessable accordingly." Again at p. 209 Lord Phillimore said: "Their Lordships would repeat that if a business be one of purely buying and selling, a profit made by the sale of the whole of the stock, if it stood by itself, might well be assessable to income tax." We submit that the present case is a great deal stronger than *Doughty v. Commissioners of Taxes* (2). *O'Kane & Co. v. Commissioners of Inland Revenue* (3) bears a strong resemblance to the present case.

The liquidator is carrying on the business for the purpose of realizing the assets, and any profits become liable to tax.

In *Herbert v. Samuel Fox & Co.* (4) Lord Atkinson said that "an arbitrator ought to distinguish clearly between his rulings on law and on fact, and cannot by finding in the words of the statute secure for a finding on a pure question of law, or on a question of mixed law and fact, that unassailability which belongs only to a finding on a question of pure fact."

This is a finding either of mixed law and fact, or of pure law.

We rely on the speech of Earl Loreburn in *Farmer v. Cotton's Trustees* (1) at p. 930.

(1) [1925] A.C. 476

(2) 43 T.L.R. 207

(3) 56 I.L.T.R. 25

(4) [1916] 1 A.C. 405

The question to be decided is, was the company carrying on business within the meaning of the Finance Act, 1920? We rely on the judgment of Lord Sterndale, M.R., in *Commissioners of Inland Revenue v. Korean Syndicate, Ltd.* (2) at p. 269.

The learned Recorder has misdirected himself by saying that a sale for realization purposes is not carrying on a business. The liquidator has earned profits, and these profits are liable to Corporation Profits Tax.

[They also referred to *Inland Revenue Commissioners v. Burrell* (3).]

*Murphy K.C.* and *Black* for the defendants:—

This is a finding of fact. *Edwards v. Old Bushmills Distillery* (4) is an authority very relevant to the present case. *O'Kane & Co. v. The Commissioners of Inland Revenue* (5) was treated in the House of Lords as a decision on a question of fact. In *Cooper v. Stubbs* (6) Pollock M.R. said at p. 762: "It is perfectly clear that the Commissioners are the judges of the facts. It is for them to find the facts. The court—whether the court of first instance before whom the case stated comes or the Court of Appeal—are bound by the facts which have been found by the Commissioners, and if they have rightly directed themselves in law their decision cannot be interfered with." To the same effect are the judgments of Warrington L.J. at p. 768, and Atkin L.J. at p. 772.

In *Doughty v. Commissioner of Taxes* (7) the question was treated as one of fact. In the present case the Recorder found that there was no trading, and that this was a question of fact. In *O'Kane & Co. v. The Commissioners of Inland Revenue* (5) there was a finding of fact in favour of the Inland Revenue authorities.

The Recorder has found that this was a case not of trading, but of realization sales. These were in fact capital transactions. There was an express duty upon the liquidator to carry out this transaction, involving as it did

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- (1) [1915] A.C. 922
- (2) [1921] 3 K.B. 258
- (3) [1924] 2 K.B. 52
- (4) [1926] N.I. 155

- (5) 56 I.L.T.R. 25
- (6) [1925] 2 K.B. 753
- (7) 43 T.L.R. 207

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the turning of assets into money. Stock in trade is part of the assets of a company *Birch v. Cropper* (1), see the speech of Lord Macnaghten at p. 546. We rely on the judgment of Scrutton L.J. in *Inland Revenue Commissioners v. Blott* (2) at p. 675.

They were stopped.

[They had also referred to *Cape Brandy Syndicate v. Inland Revenue Commissioners* (3), *Martin v. Lowry* (4), *Currie v. Inland Revenue Commissioners* (5), *Malcolm v. Lockhart* (6), *In re Armitage* (7).]

*Davison K.C.* (in reply) :—

There can be no doubt that in the course of the liquidation a liquidator may carry on trade. The facts of the case are consistent with trading and with trading alone. Trading does not depend upon the intention with which it is done. If ever there was a case of trading in the course of winding up this is such a case.

The Recorder did not apply the true rule of law to the facts found. The question is one of law as to whether the appointment of a liquidator has the effect of changing these transactions, so as to constitute a realization. There is no ground for making any distinction between what has been done in the present case, and what would have been done, if no winding up resolution had been passed.

MOORE, L.C.J. : This comes before us by way of case stated. The facts are the same as in *Edwards v. The Old Bushmills Distillery Company* (8). Both cases depend upon similar considerations; the difference is that *Edwards v. Old Bushmills Distillery* (8) was an appeal under the Income Tax Acts, and the present is an appeal in respect of excess profits.

Under the Income Tax Acts the Recorder is sole judge of fact, and on the appeal before him under the Finance Act of 1920 creating the excess profits duty he has power to state a case for this court on points of law only. On such a case the present appeal reaches us.

- (1) 14 A.C. 525
- (2) [1920] 2 K.B. 657
- (3) [1921] 2 K.B. 403
- (4) [1926] 1 K.B. 550

- (5) [1921] 2 K.B. 332
- (6) [1919] A.C. 463
- (7) [1893] 3 Ch. 337
- (8) [1926] N.I. 155

Having said so much, I must refer again to *Edwards v. Old Bushmills Distillery Company* (1). This Court, consisting of the late Sir Denis Henry, L.C.J., and Brown, J., having decided a question not material to the present appeal, referred the matter back to the Commissioners to proceed according to law. The Court of Appeal, of which I was a member, varied not the effect, but the terms of the order. Counsel for the Inland Revenue on the appeal insisted that the court should draw an inference of fact, because they did not wish to go to the Recorder on a question of fact. In the case then stated the Commissioners set out all the incidents appearing in the present case, but omitted to give any finding of fact whether or not there had been trading by the company during the assessment period. The Court of Appeal declined to draw any inference of fact on the ground that this was the duty of the Commissioners and remitted the matter to them with a direction "that they should find whether the profits in question arose (a) from the carrying on of trade, or (b) from realization sales and capital transactions incidental to the winding up of the business."

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The appellant appealed from this decision to the House of Lords, and their Lordships took the same view, Viscount Cave, C., at p. 164, saying: "The Commissioners appear to me to have stopped short in their findings of fact, and the case contains no finding on the material question—trade or no trade. I think that the High Court and the Court of Appeal were right in refusing to go into that question, and I do not doubt that your Lordships will take the same course."

In the present case the learned Recorder has obviously set himself to answer the question as already propounded by the Court of Appeal, and approved of by the House of Lords, and he has found as a fact that the profits which are here sought to be assessed arose from realization sales and capital transactions incidental to the winding up of the business. In my judgment we cannot go behind this finding of fact except in so far as it becomes our duty to see if it was one at which His Honour could reasonably have arrived.

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There is no dispute about the following matters. The company, having resolved to go into liquidation, were able almost immediately to dispose of the Comber Distillery, lock, stock and barrel, but could not get rid of the Old Bushmills Distillery, its machinery and stock, with like expedition. There appears to be a limited market both for distilleries and white elephants. The concern was in charge of the liquidator who had been appointed for its disposal, and he stopped the manufacture of whisky at the Old Bushmills Distillery as from 31st March, 1921. At that time there were many thousands of gallons of whisky on hand, and, failing to sell the whisky in bulk, the liquidator made minor purchases of spirit for blending, and of bottles and casks, in order only to facilitate sales, and by so doing subsequently did sell the entire quantity in what I may call "parcels" during a period which extended over two years. There was no other practicable way of realizing the property of the company. The monies received from such sales during this period were treated as capital, and as such were regularly distributed in proper priorities between those having claims upon the capital of the company as creditors and shareholders, the importance of this is that such distribution deprived the company of working capital which it did not require as it was not manufacturing during the period of distribution. These were the facts from which the Recorder drew an inference of fact that the profits in question did not arise from trading but from realization sales incidental to the liquidation of the company.

In my opinion the question remained a pure question of fact. Was the company trading or was it not? The Recorder has found as a fact that these were not ordinary trading sales, and that, therefore, the profits were not profits of trade. On the evidence we cannot override the decision of the learned Recorder, nor decide that he was bound to find the company liable, and this is our answer to the precise question submitted to us in the case.

The appeal will be dismissed with costs.

BROWN, J. : I concur with the judgment which has just been given, and have not much to add.

I agree that the question whether or not the liquidator was carrying on a trade or business was a question of fact.

For the reasons stated by my Lord, I think that there was ample evidence to justify the finding of the learned Recorder. Nothing could be clearer than the decision of the Court of Appeal in *Edwards v. Old Bushmills Distillery Company* (1). There was a clear distinction drawn by the Court of Appeal between sales incidental to liquidation and those incidental to the carrying on of a trade or business.

The finding of fact of the Recorder stands, and we do not touch it.

Solicitor for the plaintiffs : *Solicitor of Inland Revenue*.

Solicitors for the defendants : *Shean & Dickson*.

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[IN THE COURT OF APPEAL.]

GIBSON v. O'KEENEY.  
(1926. No. 2736.)C.A.  
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Dec. 20*Negligence—Negligent driving of motor car by son of owner—  
Non-liability of owner—Master and servant—Agency.*

The plaintiff, whilst riding his motor cycle, collided with the defendant's motor car, which was driven by J. a son of the defendant. As a result of the collision the plaintiff sustained serious injuries. The plaintiff sued to recover damages in respect of personal injuries, and damage to his motor cycle caused by the negligence of the defendant, her agent or servant, in the control and management of the defendant's motor car.

In answers to interrogatories the defendant admitted that she was the registered owner of the motor car; that her son C. and her daughter H. were licensed drivers; that she had purchased the car for pleasure; that she paid for all the petrol and oil; that her son J. resided with her; that she paid the rent for a lock-up garage the key of which was kept by her son C. At the trial the plaintiff produced a witness who stated that he saw J. driving his mother's car more than once prior to the day of the accident. The defendant denied that she knew that her son J. had a key of the garage in his possession on the day of the accident, or that she knew he had access to the key, and stated that she never at any time gave J. permission to drive her car, and that he never drove it to her knowledge.

An application for a direction in the defendant's favour on the ground that there was no evidence that the defendant's son J. was on the occasion of the accident acting as the servant or agent of the defendant, or that he was engaged on the defendant's business, was refused. The trial judge amongst other questions asked the jury to find whether the defendant's son J. was at the time of the accident driving the motor car with either the express or implied authority of the defendant. The jury answered in the affirmative, and found in answer to a supplemental question that the authority was implied. The jury found £2,250 damages against the defendant, who moved to have the verdict set aside and judgment entered for her in the action.

*Held*, by the Court of Appeal (Andrews and Best L.J.J.) that if the answer of the jury that J. at the time of the accident was driving the car with the implied authority of the defendant, amounted to a finding of agency, it must be set aside on the ground that there was no evidence to support it; and if the answer amounted to a finding of bailment that the verdict must be set aside, as a bailor is not responsible for the negligence of his bailee.

(1) Before Andrews and Best L.J.J.

MOTION on behalf of the defendant Rose O'Keeney, for an order that the verdict and judgment entered for the plaintiff be set aside with costs, and that judgment be entered for the defendant, Rose O'Keeney, dismissing the plaintiff's action with costs, or in the alternative that a new trial be directed on the grounds :—

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- (a) That there was no evidence proper to be left to the jury that James O'Keeney at the time of the accident was driving the motor car as the servant or agent of the defendant.
- (b) That there was no evidence that at the time of the accident he was driving the motor car on the business of the defendant, or so as to establish any legal liability on the part of the defendant.
- (c) That the trial judge ought to have acceded to the application of the defendant's counsel to direct the jury to find in favour of the defendant on either or both of the above grounds.

The writ of summons in the action named Rose O'Keeney as the defendant, and was indorsed with a claim "for damages for personal injuries and for damage to the plaintiff's motor cycle caused by the negligence of the defendant, her agent or servant in the control and management of a motor car, the property of the defendant."

The plaintiff alleged by his statement of claim, that on 14th May, 1926, he was lawfully riding his motor cycle on the public highway, when the defendant, her servant or agent so unlawfully, unskillfully, recklessly, and negligently controlled and managed a motor car the property of the defendant, that the motor car collided with the plaintiff and his motor cycle, and threw him to the ground with great violence, and claimed £7,000 damages.

The defendant, in addition to the usual traverses, denied that she or her agent or servant was guilty of the alleged or any unlawfulness, unskillfulness, recklessness or negligence, and pleaded that the motor car was not controlled or managed by her, nor was it controlled or managed by any agent or servant of hers.

The defendant, in her answers to certain interrogatories, admitted that she was the registered owner of the motor car on 14th May, 1926, and further, that she was not

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herself a licensed driver, but that her son Charles and her daughter Mona were licensed; that she had no paid driver; that she had purchased the car for pleasure; that she paid for all the petrol and oil; that her son James resided with her; that she paid the rent of a lock-up garage, the key of which was kept by her son Charles, generally in his pocket, unless her daughter wanted the car, when he would hand it to her, or very often he would bring the car round to the door for her. She denied that she knew that her son James had a key of the garage in his possession on 14th May, or that she knew he had access to the key.

The following statement of the facts is taken from the judgment of Andrews L.J. :—On 14th May, 1926, whilst the plaintiff was riding his motor cycle on the road between Donaghadee and Groomsport, he collided with the defendant's motor car, driven by her son James, and sustained very serious injuries, as a result of which his right leg had to be amputated below the knee. The plaintiff produced as witness a man called James M'Arthur, a driller by trade, who stated that he saw James driving his mother's car in the month of May, more than once prior to May, 14th. In cross-examination he said that he had only seen James driving twice, but that Charley was in the car constantly.

The plaintiff's case closed without any further evidence having been given on his behalf.

M'Gonigal K.C. then asked for a direction in favour of the defendant, on the ground that the plaintiff had given no evidence proper to be submitted to the jury that James O'Keeney on the occasion of the accident, was acting as the servant or agent of the defendant in driving the motor car, or that he was engaged on the defendant's business. The learned Lord Chief Justice refused the application. The defendant was then called. She stated that she had taken out driving licenses for her daughter Mona and her son Charles who had been taught to drive, but that she never at any time gave James permission to drive her car, and that he never drove it to her knowledge. Referring to the day of the accident, she said that James came to her in her shop and asked for keys of the garage, stating that he and M'Manus, a motor mechanic were going

out. She said she told him that he had no licence, and that she would not allow him to have the car. On cross-examination she said she had been out in the car when Charles was driving and James with her; that she had been out with Mona, but that James never drove the car before 14th May. James explained in his evidence how he had unsuccessfully tried to get the garage keys in the kitchen before going to his mother, who refused to allow him to drive the car adding that Charles had the keys and had gone to the baths where he (James) should also go, and that the car was not going out unless Charles was with him. Next he described how M'Manus and he forced an entrance to the garage with the aid of a screwdriver, and how, after taking the car out, they picked up another chum called Napier, M'Manus driving until a short time before the accident, a distance of approximately twenty miles. He admitted that on one previous occasion, when his sister let him have it, he had driven the car with M'Manus, two or three times up and down the North Circular Road, but denied M'Arthur's statement that he had driven the car in May. To the learned Lord Chief Justice he said he had told Doctor Gibson that he had been in the car six times, not that he had driven it, and that he had been convicted of driving the car (i.e., on the day of the accident) without having a licence. Charles O'Keeney and M'Manus, who were called as witnesses, corroborated material portions of James' and his mother's evidence. Napier stated that James O'Keeney, M'Manus and he were out for a joy ride by arrangement. Miss Muriel Wilson, whose father had a place in the same yard as O'Keeney's garage, gave evidence to the effect that James had come on this occasion for the yard key, but had never done so before. The evidence closed with the calling of Doctor Gibson for the plaintiff to give rebutting evidence. He stated that on 21st February, 1927, James had said to him that he was driving the car that night not for the first time, and that he added he "had her out more than six times before."

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M'Gonigal K.C. renewed his application for a direction. The Lord Chief Justice again refused the application.

The Lord Chief Justice left a number of questions to the jury. The form of the first question was accepted by the

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Attorney-General. These questions with their answers were as follows:—

- (a) Was James O'Keeney at the time of the accident driving the car with either the express or implied authority of the defendant to do so? Yes.
- (b) If so, was James O'Keeney guilty of negligence? Yes.
- (c) Was the plaintiff injured thereby? Yes.
- (d) If the defendant by James O'Keeney was guilty of negligence, was the plaintiff guilty of contributory negligence? No.
- (e) If the plaintiff was guilty of contributory negligence could James O'Keeney by the exercise of reasonable care have avoided the consequence of plaintiff's negligence?
- (f) Damages (if any). £2,250.

In answer to a supplemental question the jury found that the authority given by the defendant to her son James was implied.

The jury accordingly found for the plaintiff for £2,250.

The Lord Chief Justice gave judgment for the plaintiff for that sum, with costs, but stayed execution to enable the defendant to move to have the verdict and judgment set aside.

*M'Gonigal K.C.* made the following objections to the Lord Chief Justice's charge to the jury:

- (a) In that the Lord Chief Justice told the jury that if James O'Keeney was driving the car with the express or implied authority of the defendant, that makes the defendant liable for his negligence.
- (b) In that he told the jury that if an owner of a car says to his two sons living in his house, the car is there for you to drive, that is express authority which makes the owner liable for the negligence of his sons.
- (c) In that he told the jury that if the owner says nothing, but just leaves the car there, and knows the boys are using the car, that is implied authority, which makes the owner liable if they take out the car and an accident happens.
- (d) In that he told the jury that if the defendant puts the car in charge of Charley, and Charley leaves the keys about for James to take, and she shuts her eyes to what is going on, that is implied authority, which makes the defendant liable, if James takes

the car out and an accident happens through his negligence.

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(e) In that he told the jury that if the defendant allows James to use the car she is liable in law for anything he does.

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(f) He also submitted that the Lord Chief Justice should have told the jury that the defendant was not liable, unless James O'Keeney was driving the car as agent or servant of the defendant, and on her business, at the time the accident happened.

*M'Gonigal K.C., W. Whitaker K.C., Beattie K.C. and Fox* in support of the motion.

The motor car was taken out of the garage without the defendant's permission. The plain issue is, was James O'Keeney the servant or agent of his mother and engaged upon her business. There was no evidence on the first question to go to the jury. The present case differs from *Thompson v. Reynolds* (1), where there was express authority to take out the motor cycle. We submit we were clearly entitled to the direction asked for at the trial. There is no evidence that this boy when he was driving the car was the servant or agent of his mother or out upon her business. Mere permission is not sufficient to establish liability. There is no evidence that James had implied permission to take the car out. Such express or implied permission could at most do no more than create a bailment. There is no difference between the status of a relation and that of a stranger, so far as bailment is concerned. We rely on the words used by Lord Atkinson in his judgment in *Samson v. Aitchison* (2), at pp. 846-7, and also at p. 849, and on the judgment of Palles C.B. in *Cornack v. Digby* (3) at pp. 560-561, who was clearly of opinion that a mere bailment would not establish liability. *Dowling v. Robinson* (4) strongly resembles the present case. There is no evidence of any act done by James in taking the car out having been adopted by his mother. It is sought to identify the defendant with the act of her son, although it was held in *Wellwood v. King* (5) that the doctrine of identification

(1) [1926] N.I. 131

(4) 43 I.L.T.R. 210

(2) [1912] A.C. 844

(5) [1921] 2 I.R. 274

(3) 1.R. 9 C.L. 557

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of bailor and bailee is not applicable in relation to liability for negligence. Apart from service or agency the defendant has no liability for the acts of her son. Evidence of driving on previous occasions is no evidence of authority to drive on this particular occasion. In *Powell v. M'Glynn & Bradlaw* (1) Holmes L.J. said at p. 195 that the rejection by the jury of certain evidence has not the effect of substituting for it evidence of a contrary or different character. The only persons for whom the defendant is responsible are servants (including agents). Was this boy at the time of the accident acting as the servant or the agent of the defendant, and if so, was he acting in the course of his employment, and on the defendant's business? There is not throughout the whole case any suggestion that this boy was on his mother's business. We submit that the plaintiff has failed because he has not proved that James was the servant of the defendant, and that he was acting in course of his employment or on the defendant's business. It has never been suggested that the donor of a license makes himself responsible for the negligence of the licensee. There is no suggestion that the defendant knew of or acquiesced in James driving.

(They also referred to *The Bernina* (2), *Jones v. Scullard* (3), *Bull & Co. v. West African Shipping Co.* (4).

*A. B. Babington K.C.* (Attorney-General), *Murphy K.C.* and *MacDermott* for the plaintiff :—

This case differs from any of those cited on behalf of the defendant. Here there was a grown up family, and the car was purchased for family use, not for business, but for pleasure. The defendant herself was not a licensed driver. She had no chauffeur, but Charles and Mona had express authority to drive the car, and did drive it. It can hardly be suggested that they were driving as bailees. The liability in this case does not flow from family obligation, but from the fact that the defendant constituted the members of the family, drivers of the car, and they therefore became her agents. It was bought by the defendant, in order that it might be used by the members of her

(1) [1902] 2 I.R. 154  
(2) 13 A.C. 1

(3) [1898] 2 Q.B. 565  
(4) [1927] A.C. 686

family as well as for the defendant herself. It is admitted that James had driven the car on one occasion previous to the accident, and according to Doctor Gibson's evidence, this same member of the family had the car out more than six times. We submit that the Lord Chief Justice was correct in ruling on the finding of the jury, that liability had been established. There was implied authority in this case which establishes agency. There is nothing unlawful in giving authority to an unlicensed person. If the defendant knew and approved of the driving of the car by an unlicensed person, she should be held liable. *Powell v. M'Glynn & Bradlaw* (1) is quite different from the present case. The judgment of Fitzgibbon L.J. in that case must be taken in conjunction with the facts. Here the jury have found authority and therefore trespass is out of the case. Any member of the family who takes the car out, is driving it for the pleasure of the family, and as agent of the mother. The witnesses for the defence were disbelieved by the jury and by the learned Lord Chief Justice. There was evidence to go to the jury at the close of the plaintiff's case. In *Parker v. Miller* (2) it was held that the court should look not at the physical control, but at the right of control. We submit that *Parker v. Miller* (2) is closely applicable to the facts of the present case.

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*M'Gonigal K.C.* (in reply) :—Assuming the evidence to support authority, this is a simple case of bailment. A bailment is defined in Halsbury, vol. I, p. 524, as “a delivery of personal chattels in trust, on a contract, express or implied, that the trust shall be duly executed, and the chattels redelivered in either their original or an altered form, as soon as the time or use for which they were bailed shall have elapsed or been performed.” Assuming there is no question of family authority, the present case comes exactly within this definition. In *Reichardt v. Shard* (3) the presence of the owner's chauffeur was required, in order to involve liability. In

(1) [1902] 2 I.R. 154  
(2) 42 T.L.R. 408

(3) 31 T.L.R. 24

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*Samson v. Aitchison* (1) Lord Atkinson said at p. 849, "No doubt if the actual possession of the equipage has been given by the owner to a third person—that is to say, if there has been a bailment by the owner to a third person—the owner has given up his right of control." *Parker v. Miller* (2) is clearly distinguishable. There the bailment had come to an end, and the right of control of the owner had been resumed. The verdict should be entered for the defendant.

*Cur. adv. vult.*

Dec. 20

ANDREWS L.J. : This is a motion by the defendant for an order that the verdict and judgment entered for the plaintiff for the sum of £2,250 be set aside, and that judgment be entered for the defendant, or, in the alternative, for a new trial. The grounds of the application are that the learned Lord Chief Justice (before whom the case was tried, with a special jury of the City of Belfast) ought to have directed in the defendant's favour, that he misdirected the jury as to certain matters of law, that the first question submitted to the jury was not the proper question to determine the defendant's liability, that the findings of the jury were against evidence and the weight of evidence, and perverse, and further that the trial was unsatisfactory.

The plaintiff, who is a minor, sued by his father and next friend to recover damages in respect of personal injuries and damage to his motor cycle caused by the alleged negligence of the defendant, her agent or servant, in the control and management of a motor car, the property of the defendant.

His Lordship, having stated the facts, continued :—

Mr. M'Gonigal's application for a direction on the ground that there was no proper evidence that James O'Keeney was on the occasion of the accident acting as the servant or agent of the defendant in the driving of the motor, or that he was engaged on the defendant's business, was refused by the learned judge both at the close of the plaintiff's case and also at the close of the evidence. A discussion then followed in regard to the questions, Mr. M'Gonigal asking the learned judge to amend the draft of

the first question (as to whether James was driving with either the express or implied authority of the defendant) by specifically asking whether he was driving "as servant or agent," though he admitted that on the evidence the word "servant" was not apposite. The learned judge refused to amend, but, on the jury finding the existence of the defendant's authority, the learned Chief Justice put a supplemental question to them as to whether such authority was express or implied, to which the jury answered that it was implied. The jury did not accept the evidence of the defendant and James as to the latter's prohibition by the former against driving. The learned Chief Justice concurs in their view. He tells us further, however, in his report that James was not the servant in fact of the defendant and that he was not at the time of the accident driving on the defendant's business. This, he adds, was the reason why he put the first question to meet the facts as in evidence, and he told the jury that they might infer authority from the defendant to James to drive, if they believed she was cognisant of his doing so, but that even then the question of her liability remained a legal one. On the jury's answer to question 1, the learned Lord Chief Justice was of opinion that the plaintiff was entitled to judgment and directed accordingly.

Mr. M'Gonigal made several objections to the learned judge's charge in regard to the existence of legal liability arising from the defendant's express or implied authority. It does not definitely appear from the report of the Lord Chief Justice whether he agrees that the statements attributed to him were actually made by him, but the arguments before us proceeded on the assumption that they were so made. In particular, it was not contested that the Lord Chief Justice told the jury that if the owner says nothing, but just leaves the car there, and knows the boys are using the car, that is implied authority which makes the owner liable if they take out the car and an accident happens. It is submitted that it was because of this direction that the jury found the existence of an implied authority.

It must be admitted that the defendant can only be liable in law for the act of her son James, if at the time of the accident he was driving the motor as her servant or agent. No one suggests or could reasonably suggest, on the facts

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of the present case, that he was his mother's servant, for none of the usually accepted conditions of such relationship exists. The word "servant" was, as Mr. M'Gonigal stated, not apposite. In so stating I do not wish it to be inferred that I consider that in their main features any difference exists between the principles which regulate the liability of a master for the torts of his servant and those which determine the liability of a principal for the torts of his agent. For all ordinary purposes they are identical, the liability in both cases being based on the principle *Qui facit per alium facit per se*.

As the liability, therefore, must on the facts of this case rest, if at all, on the existence of agency, we have first to consider whether the defendant's son James was her agent for the purpose of driving the car at any time; and, if so, was he acting within the scope of his authority and as her agent in the driving of the car at the time of the accident? My clear opinion in favour of the defendant on the first of these questions renders it unnecessary for me to consider the second.

The term "agent" has been defined by judges and textbook writers in varying terms. In *Bowstead on Agency* he is referred to as "a person having express or implied authority to represent or act on behalf of another person who is called his principal." In *Evans on Principal and Agent*, citing from Coke on Littleton 207, he is described as "a person duly authorized to act on behalf of another, or one whose unauthorized act has been duly ratified." But, however the legal definitions of "agent" may differ in their terms, one element is necessarily common to them all—the agent is a person who acts on behalf of another; he acts not for himself but for some one else who is called the principal. It is really the principal's act done through his agent. For the sake of brevity, I would refer to the views which I expressed at greater length on this subject when giving judgment on Friday last in the case of *O'Keefe v. London & Edinburgh Insurance Company Limited* (1).

When I look at the proved facts of the present case I am unable to find any upon which I can hold that James was at any time constituted his mother's agent for the

purpose of driving her car. On the contrary the facts appear to me clearly to negative any such conclusion. The defendant had her children Mona and Charley instructed in the driving of her car; she took out drivers' licences for them; and they frequently drove her in the car, which, as she states, was purchased for pleasure. They were clearly her agents to drive, and, if the accident had occurred when one or other of them had been driving, it would have been necessary to consider whether he or she was acting as such agent in the driving of the car at the time of the accident. James was never taught to drive, had no licence, and never drove his mother. She never requested, instructed or authorized him, either expressly or impliedly, to do anything in the nature of driving the car on her behalf. Accordingly, she never constituted him in any way or at any time her agent to drive.

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It was strenuously urged on behalf of the plaintiff that the jury were entitled to find, and that we ought to hold, the existence of an implied authority in James to drive the car arising from the fact that he had admittedly driven the car on one occasion previously when accompanied by M'Manus, and reliance was also placed on M'Arthur's evidence that he had seen James driving the car more than once, and on the admission which James is alleged to have made to Dr. Gibson that he had had the car "out" six times or more, or, as James himself put it in his evidence, that he had been "in the car six times, not that he had driven it." In my opinion, however, this evidence fails to establish agency for two reasons. In the first place, no one proved that James drove the defendant in the car on any of the occasions referred to—however many or few they may have been—or that it was driven by him to her knowledge, i.e., either with her primary authorization or subsequent ratification. On the contrary, she swore most positively, as above stated, that she never at any time gave James permission to drive her car, and that he never drove it to her knowledge. No facts were proved from which the jury could reasonably infer the existence of such knowledge as to James' driving the car either on the day of the accident or at any time previously. In the second place, the evidence as to James driving the car on

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previous occasions, even if it were assumed to have been done to the defendant's knowledge, is in my opinion more consistent, on the facts of this case, with bailment than with agency; for, even if we reject, as the Lord Chief Justice and the jury did, the evidence of James and his mother as to her refusal to allow him to take the car out on the day of the accident, I am quite unable to see how, in going by prearrangement for a long joy ride such as this with his chums, he was engaged in her business, or was doing something on her behalf. I am utterly unable to hold the existence of an agency for the purpose of conferring pleasure, advantage, or profit solely upon the agent; and in my opinion it makes no difference whether such alleged agent is a son of or a stranger to the alleged principal; for, as the learned Attorney General very properly admitted, he did not put his case on the basis of family obligation. In no case that I am aware of has it ever been suggested that the law of agency is subservient to such considerations. Mere family relationship does not create rights or impose obligations of such a character.

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I am, accordingly, of opinion that if the answer of the jury to the first and supplemental questions submitted to them, namely, that James O'Keeney at the time of the accident was driving the car with the implied authority of the defendant to do so, amounts to a finding of agency, it must be set aside on the ground that there is no evidence to support it. In this connexion I would add that I entirely concur in the view expressed by Holmes, L.J., in *Powell v. M'Glynn & Bradlaw* (1), that the rejection of testimony by the jury has not the effect of substituting for it evidence of a contrary or different character. If, on the other hand, the answer of the jury amounts merely, as it well may do, to a finding of the bailment of the car by the defendant to her son, such answer, even if we were to admit it to be supported by proper evidence, establishes no liability on the defendant, for the bailor is not legally responsible for the negligence of his bailee, as the doctrine of identification does not apply to such a relationship in the way it does to master and servant or principal and agent.. *Wellwood v. King* (2).

(1) [1902] 2 I.R. 154 at p. 195      (2) [1921] 2 I.R. 274 at p. 297

These considerations enable us to distinguish all the cases which were relied upon in argument on behalf of the plaintiff. Thus in *Samson v. Aitchison* (1) the Privy Council held the owner of a vehicle who remained in possession and occupation of it liable for the negligence of another whom he requested or allowed to drive, for this did not exclude the owner's right and duty of control. On the view of the facts accepted by the trial judge and Privy Council the driver was clearly the owner's agent, and this is the main point of distinction between that case and the present. It is instructive, however, before passing from the case to note the passage from the judgment of Williams, J., the trial judge, which Lord Atkinson cites as laying down the law with perfect accuracy, and part of which is as follows :—" No doubt if the actual possession of the equipage has been given by the owner to a third person—that is to say, if there has been a bailment by the owner to a third person—the owner has given up his right of control." In the light of this passage, and even assuming, though in my opinion there is no proper evidence of it, that the defendant in the present case gave either express or implied permission or authority to her son to take out the car, she must be held to have abandoned the right of control, and at most to have created a bailment of the car.

*Parker v. Miller* (2) was also strenuously relied upon by the plaintiff. There the owner of the motor frequently allowed a friend to drive it. On the day of the accident the owner drove it to the house of his friend, to whom apparently he handed over the driving of the car. When the car came back it was driven by the friend to his own house, the owner having been left a short distance away. The friend left the car, as he had frequently done before, at the top of a hill outside his house, and it ran away and did the damage complained of. Shortly afterwards the owner returned to this house walking. It was held that, although the owner against whom the action was brought was not in control of the car when the accident happened, he had the right of control, and, on the principle laid down in *Samson v. Aitchison* (1), that this was evidence on

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which it could be held that he was responsible as principal. Here again the friend whose negligence caused the accident was on many previous occasions and actually on the day of the accident the defendant's agent to drive; and the court not unreasonably considered that the defendant did not abandon his right of control during the short period which elapsed between the time that he left the car and the time that he came to retake possession of it. The friend's character, accordingly, never changed from agent to bailee.

*Pratt v. Patrick & Others* (1), which was not cited in argument, is another illustration of how liability continues when a casual delegation to the agent of actual physical management and control is accompanied by a clear retention of the right of control.

The present case is in my opinion much weaker than *Dowling v. Robinson* (2), in which it was held that there was no evidence that the defendant's brother, who was admittedly in his employment for the purpose of testing cars, was at the time of the accident acting as his servant within the scope of his employment, Fitzgibbon, L.J., directing special attention to the danger of arguing from the particular to the general.

Without making any further examination of the cases, I have only to say that in my opinion the defendant was entitled to a direction, and that she is now entitled to judgment with costs of action and of this motion. I should perhaps add, to prevent any misapprehension, that I do not agree with the direction which the Lord Chief Justice is alleged to have given to the jury on the subject of implied authority; but, as such misdirection would only entitle the defendant to a new trial, it is unnecessary for me to deal further with the matter.

BEST, L.J., having reviewed the facts of the case, said:—

Mr. M'Gonigal, K.C., asked for a direction in favour of the defendant on the ground that the plaintiff had given no evidence proper to be submitted to the jury that James

O'Keeney, on the occasion of the accident, was acting as the servant or agent of the defendant in driving the motor car, or that he was engaged on the defendant's business.

Plaintiff had made it the ground of his cause of action that defendant, her servant or agent had so unlawfully driven the motor car that the injuries complained of were caused to him. Admittedly the defendant herself was not driving the motor car on the occasion of the accident, and the onus therefore lay on the plaintiff of showing that the driver of the car, James O'Keeney, was the servant or agent of the defendant; and further, that at the time of the accident he was engaged on the defendant's business.

The facts admitted by the defendant in her answers to the interrogatories do not, in my opinion, afford any proof whatsoever (a) that James O'Keeney was defendant's servant, or (b) her agent, or (c) that in driving the motor car he was engaged on the business of the defendant.

Nor is the matter put any further by the evidence of James M'Arthur that he saw James O'Keeney driving the motor car on two occasions. This might possibly be some evidence of permission to drive the car, though even of this I am doubtful, bearing in mind that young people of to-day are so eager for exciting adventures that they will indulge in them in defiance of parental or other authority. I think that the mere driving of the car on the two occasions deposed to by M'Arthur is not evidence that James O'Keeney was, on the date of the accident, the servant or agent of the defendant, or employed on her business. I am, therefore, of opinion that Mr. M'Gonigal's requisition was well founded; that it ought to have been acceded to, and that at the close of plaintiff's case the defendant was entitled to a direction and judgment. Mr. M'Gonigal, instead of standing on his requisition, elected to go into evidence. I am not to be taken as criticising him for taking this course, but merely state the fact; and it therefore becomes necessary to inquire whether the infirmity which in my opinion, attached to the plaintiff's case when it closed, was cured by the evidence given by and on behalf of the defendant or by the course of the trial.

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Defendant's case having closed, Dr. John Gibson was called to give rebutting evidence. He said: 21st February (i.e., 1927) I saw James O'Keeney. I had some words. I asked him was he driving the car that night. He said he was. I said, "Was that the first time." He said, "No." I asked him, "Had you her out often?" I said, "Six times?" He said "More than that."

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Cross-examined: I had a detective with me, but I did not know he was a detective.

Whatever may be said of the value to the plaintiff of this rebutting evidence, I think that the method by which it was obtained is not to be commended. The pleadings in the action had been closed, and the parties were completely at arm's length.

Mr. M'Gonigal then renewed his application for a direction, which was again refused. He also made several objections to the charge to the jury:—

(These objection already appear in this report).

The grounds on which the verdict and judgment are attacked are set out at length in the notice of appeal, but they are in substance contained in Mr. M'Gonigal's requisition for a direction and in his objections to the Lord Chief Justice's charge to the jury.

Two main questions emerge:

1. Were the questions put to the jury and their answers thereto sufficient to try the case and to impose liability on the defendant

2. Was there at the close of the case evidence proper to be submitted to the jury that James O'Keeney was the servant or agent of the defendant; and if he were such servant or agent, was he engaged on the defendant's business?

The first question put to the jury and a supplement to it are alone material. The first question was as follows:—Was James O'Keeney, at the time of the accident, driving the car with either the express or implied authority of the defendant to do so? Yes; and in the answer to the supplemental question (a), was the authority express or (b) was the authority implied, their finding was "implied." The Chief Justice in his report says:—

"The question of the liability of the defendant for the negligence of her son was both on the facts and on the law

more strenuously contested (than was the issue of negligence). The Attorney General told the jury in opening that an injured person in the position of the plaintiff was at the mercy of persons like defendant and her son if they chose to invent defences of arrangement among themselves, of which necessarily the plaintiff could have no knowledge. The jury did not accept the story of the defendant and James as to prohibition of the latter by the former and again, I think, rightly. I told the jury if they did believe this story they should find for the defendant. The son James was not the servant in fact of the defendant and he was not at the time of the accident driving on the defendant's business. I therefore put the first question to meet the facts as in evidence; this form was accepted by the Attorney General. I told the jury they might infer authority from the defendant to James to drive if they believed she was cognisant of his doing so. Even then the question of her liability remained a legal one. I was of opinion that on the answer of the jury to question No. 1 plaintiff was entitled to judgment."

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The whole foundation of plaintiff's action rested on proof that James O'Keeney was the servant or agent of the defendant at the time of the accident and that he was then engaged on her business. This is what plaintiff had pleaded. M'Gonigal K.C. had asked that the question of "servant or agent" should be left to the jury for the Chief Justice reports that "I state question (a) as to agency. Attorney General accepts my draft of (a). M'Gonigal K.C. asks me to leave "as servant or agent." I refuse. M'Gonigal K.C. admits servant not appropriate."

I cannot agree that plaintiff is entitled to judgment on the answer to question No. 1, assuming that the jury were at all justified in answering the question as they did. It might well be that a son has general authority from his parent to use a motor car or other conveyance the property of the parent, but it is a long step from the giving of this authority to the fastening of liability upon the defendant for the tortious acts of the son. In such a case as the present, the liability can only arise if the relation of master and servant or of principal and agent exist, and

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if the tortious acts or negligence of the servant or agent were done by the servant or agent within the scope of his employment or authority.

In spite of the attitude of Mr. M'Gonigal the case was allowed to go to the jury on the question of James O'Keeney's authority to use the car of his mother, the defendant.

BEST L.J.

Question No. 1, as put, was not an appropriate question upon which to found liability on the part of the defendant if the question were answered in plaintiff's favour.

I think that Mr. M'Gonigal was entitled to have the question put to the jury in the form suggested by him. If the first question had been put to the jury in this form they could not, in my opinion, on the evidence, either at the close of the plaintiff's or at the close of the defendant's case, have answered it in favour of the plaintiff. Indeed, the Lord Chief Justice himself reports that as the son James was not the servant in fact of the defendant, and was not at the time of the accident driving on the defendant's business, he put the first question to meet the facts as in evidence.

I put the question more than once during the argument, what was the business of the defendant upon which James O'Keeney was engaged when the accident occurred, and as far as I could understand the answer it was to the effect that as defendant had said in reply to interrogatory No. 7 "For what purpose did you purchase the said motor" that it was "for pleasure," then in some mysterious way James O'Keeney was carrying out his mother's business when he was in reality indulging in a joy ride. I think that much more than this is necessary to fasten the defendant with liability, and I am of opinion that judgment should be entered for the defendant with costs of the action and of this motion.

Solicitor for the plaintiff: *William Alexander.*

Solicitors for the defendant: *D. O'Rorke & Son.*

J. M'C.

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(1926. No. 3675.)

*Insurance—Fire Policy—Nondisclosure by insured of material facts—Principal and agent—Condition in policy as to disclosure—Knowledge of agent acquired prior to agency not imputable to principal.*

L. B. & Co., agents of defendants, who had no express power to do so, appointed R. M. as their local agent in Armagh district, but did not inform the defendants, who neither approved of nor ratified this appointment. M. in October, 1925, sent to L. B. & Co. particulars of a proposed insurance against fire for the plaintiff on his dwelling house, and a policy for £1,550 was issued by defendants to plaintiff. This policy provided that if there was any misrepresentation as to any fact material to be known for estimating the risk or any omission to state such fact the defendants should not be liable. The plaintiff did not disclose the fact that his house had been burnt down in 1922 and that the C. Company had paid him £1,558 in respect of that loss. The plaintiff's house was burnt on 25th December, 1925, and the loss was notified to defendants by the plaintiff on 26th December, and a claim for £729 10s 0d was made on foot of the policy. The defendants disclaimed liability on the ground that the plaintiff, contrary to his common law duty and to the condition of the policy, had omitted to disclose the fact of the previous fire.

In an action on the policy tried before the Lord Chief Justice and a special jury the jury found (1) that in respect of the policy M. was acting as agent for L. B. & Co. in the Armagh district; (2) that L. B. & Co. were agents for the defendants to the knowledge of M.; (3) that the defendants after the fire were aware that L. B. & Co. were employing district agents in Armagh district; (4) that it was reasonably necessary to get business for L. B. & Co. to employ district agents in Armagh; and that the defendants should have been aware before the fire that L. B. & Co. were employing such district agents.

Upon motion by the plaintiff and cross motion by the defendants for judgment on these findings,

The Court of Appeal (Andrews and Best L.J.J.) held that the defendants were entitled to judgment on the ground that M. was not their agent; that M.'s knowledge of the earlier fire whenever acquired could not be imputed to the defendants, and accordingly that the plaintiff had concealed a material fact and thereby relieved the defendants from all liability under the policy.

Held, also that even if M. was the defendants' agent his knowledge acquired prior to his appointment as agent could not be imputed to the defendants.

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MOTION on behalf of the plaintiff, cross-motion on behalf of the defendant for judgment on the findings of the jury.

The plaintiff claimed the sum of £729 10s 0d under a policy of insurance dated 14th October, 1925. The defendants by their defence relied on the concealment of material facts, in that the plaintiff omitted to disclose to the defendants that he had had previous fires, and that his proposals for insurance had on previous occasions been declined by other insurance companies. They also relied on a breach of conditions of the policy by the withholding of these material facts. The plaintiff replied that Martin as agent for the defendants had full information of any material fact within the knowledge of the plaintiff. The action was tried before Moore L.C.J., and a special jury of the city of Belfast.

The following statement of the facts is taken from the judgment of Andrews L.J. :—

The defendants are an insurance company whose principal office is situate in London. On 1st October, 1925, Messrs. Lloyd Blood & Company, of Waring Street, Belfast, applied to the defendants to be appointed their agents, and they received notification of their appointment in a letter dated 5th October, 1925. The terms of this appointment are set out with much particularity, but it is to be specially noted that they contain no express power or authority to appoint sub-agents, or, indeed, any reference to this. L. B. & Co. on 3rd August, 1925, offered Martins the appointment of agents or representatives under them for the defendant company.

On 12th October, 1925, Martins sent to Lloyd Blood & Company particulars of a proposed insurance for the plaintiff on, amongst other premises, his dwelling-house in Balleer and asked for cover. This letter was duly acknowledged on 13th October by Lloyd Blood & Company who, as requested, sent Martins a cover note for the proposed amount of £1,550. On the same day they wrote direct to the plaintiff intimating that the premium should be remitted immediately. The policy was duly completed on 14th October and forwarded by the defendants to Lloyd Blood & Company, who, in turn, sent it to Martins with covering letter of 19th October. The plaintiff's dwelling-

house was burnt on 25th December, 1925, and this was duly notified to Martins by letter from the plaintiff on 26th December. Martins gave notice of the loss by postcard to Lloyd Blood, who, on 28th December wrote in reply: "We might mention as agents that the premium on this policy has not yet been received by us." On the same day, they also wrote to the defendants informing them of the loss, which, they say, had been notified to them by Martins whom they twice referred to as "our agents," and the defendants in turn in their letter to Lloyd Blood & Company of 30th December refer to Martin as your agents.

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Only two witnesses were called at the trial, Martin for the plaintiff, and Frank Gribble, chief clerk in their Agency Department, for the defendants. Neither the plaintiff (O'Keefe) nor Lloyd Blood was called. Martin stated he was an insurance agent for forty years; that he was acting for Lloyd Blood & Company as sub-agent or local agent for County Armagh, and that he was sole agent in that district. He said further that he knew of the insurance with the Commercial Insurance Company which he had effected, and also of the claim and settlement and that this was present to his mind when negotiating the defendant's policy on the same dwelling-house. On cross-examination he stated his ledger account was with Lloyd Blood, not with the defendants, and that he had no knowledge of Lloyd Blood's relations with the defendants except that he knew they were agents. He admitted also that he was acting as agent for O'Keefe to get him the best terms he could, and that he was going to account with Lloyd Blood for the premium, not with the defendants. Finally, he said he was agent direct for a number of companies, but was agent for Lloyd Blood to get them business. Gribble proved that the defendant company never appointed any sub-agents, and that they never knew till after the fire that Martins were acting as agents. They had never, he said, heard of them, and before the policy never heard of the previous fire. In cross-examination he admitted that it was usual for agents to employ sub-agents on their own responsibility, and added that they knew that their agents employed them, but that they don't bother their heads about sub-agents, leaving it to the

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agent's discretion to appoint sub-agents who had no authority from them.

At the close of the plaintiff's case M'Gonigal K.C. applied for a direction on behalf of the defendants on the ground that even if Martin was the defendant's agent, his knowledge could not be imputed to them as it was acquired prior to his appointment as agent. The Lord Chief Justice refused to direct.

The following were the questions left by the Lord Chief Justice to the jury, and the answers returned by them:—

(a) In respect of this policy was Martin acting as agent for Lloyd Blood in the Armagh district?—Yes.

(b) Was Lloyd Blood agent for the defendant to the knowledge of Martin?—Yes.

(c) Were the defendants aware or should they have been aware that Lloyd Blood was employing district agents in the Armagh district?—After the fire—Yes.

(d) Was it reasonably necessary to get business for Lloyd Blood to employ district agents in Armagh?—Yes.

(e) Was it a material omission to conceal the fact of the fire in 1922, if Martin did not represent defendants?—Yes.

(f) (a) Did plaintiff within fifteen days after loss deliver particulars?—No, or

(b) Did he reasonably comply with said condition by agreement with Martin?—Yes, or

(c) In the circumstances did the company waive this condition?—Yes.

(g) Was Martin only agent to procure policy for O'Keefe and dealing with Lloyd Blood as broker?—No.

Supplemental question—

Having regard to the finding on question 3, should the defendants have been aware before the fire that Lloyd Blood was employing district agents in the Armagh district?—Yes.

The Lord Chief Justice left either party to move for judgment on the findings of the jury.

The grounds upon which an order was sought that judgment might be entered for the defendants, as stated in the defendants' notice, were as follows:—That there was no evidence fit to be submitted to the jury that Martin was the agent of or in privity with the defendants; that the

plaintiff had failed to disclose to the defendants certain facts material for them to know; and that if Martin were such agent or had such privity, his knowledge had been acquired previous to the agency and could not be imputed to the defendants.

*Murphy K.C., Lowry K.C. and Copeland* for the plaintiff:—

The case for the plaintiff is based on the submission that Messrs. Lloyd Blood & Company, who were admittedly agents of the defendant company, issued this policy to the plaintiff through Martin. Martin was, we submit, a sub-agent of the defendant company. In view of the terms of condition 1 of the policy of assurance the defendants were not entitled to produce evidence of previous fires on the plaintiff's premises, especially as the plaintiff's premises had not at the time of those fires been insured with the defendant company. Contracts of insurance are to be read most strictly against the insurers. We rely on *Rossiter v. The Trafalgar Life Assurance Association* (1). We also rely on *Bawden v. The London, Edinburgh and Glasgow Assurance Co.* (2), where the knowledge of the defendant's agent was held in the circumstances to be the knowledge of the defendants. In *Holdsworth v. Lancashire and Yorkshire Insurance Co.* (3), it was held that, by receiving the premiums, the company were precluded from denying the agent's authority to alter the contract, and that in those circumstances the knowledge of the agent was the knowledge of the company. *Taylor v. Yorkshire Insurance Co.* (4) was a decision upon special facts. In *Welford and Otter Barry's Fire Insurance* (2nd edition) the law is stated as follows:—"It is difficult to see how the agent can avoid being guilty of a breach of duty in failing to communicate information which is material to the transaction which he is employed to carry out, and in allowing the insurers to enter into a contract which they would not otherwise have made; and it may therefore be concluded that his knowledge, however acquired, is to be imputed to the insurers." In principle

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(1) 27 Beav. 377  
(2) [1892] 2 Q.B. 534

(3) 23 T.L.R. 521  
(4) [1913] 2 I.R. 1

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there is no distinction between knowledge acquired at time of the transaction, and knowledge acquired previous to the transaction. We submit that it was the clear duty of the agent to communicate the information acquired before the transaction to the company, and that the plaintiff is entitled to judgment.

*M'Gonigal K.C., Whitaker K.C., Beattie K.C. and M'Kean* for the defendants:—

The defendant company never had any communication direct or indirect with Martin. No privity of contract has been established between Martin and the defendants. The evidence is overwhelming that Martin was simply a "tout" in County Armagh for Lloyd Blood & Company. Martin's transactions all took place with Lloyd Blood & Company. Martin in this particular transaction was acting as agent for O'Keefe and was not even acting for Lloyd Blood & Company. Martin had plainly no power to issue a cover note. Before Lloyd Blood & Co. could bring the defendants into privity of contract with Martin they must have had power to create privity between the defendants and Martin. There was no privity between the defendants and Martin. The basis of the judgment in *Rossiter v. The Trafalgar Life Assurance Association* (1) was that the company had given power to an agent to grant assurances, these assurances were therefore good until disaffirmed. That case when rightly understood is in the defendant's favour. The evidence is overwhelming that Martin was not the agent of the defendants. Where an agent has acquired knowledge previous to his becoming an agent, that knowledge cannot be attributed to his principal. The danger of imputing knowledge acquired before the agency is discussed by Gibson J. in *Taylor v. Yorkshire Insurance Co.* (2), at pp. 30-31. The passage quoted from Welford and Otter Barry's *Fire Insurance* (2nd Edition) is inaccurate and misleading. We rely on the statement of the law to be found in that text book at p. 84: "An agent who merely introduces business for a commission is not in any real sense of the word an agent of the insurers. He is employed to obtain business and to transmit proposals for insurance to the insurers. Apart from this he has no

(1) 27 Beav. 377

(2) [1913] 2 I.R. 1

authority to bind them by anything which he may do, such as, for instance, by accepting a proposal or issuing a cover note; nor can his knowledge of any material fact be imputed to them." It has frequently been stated by our judges that the doctrine of constructive or imputed notice should not be pushed any further. The matter would have been very different if Martin had had power to issue a cover note. Martin was an agent of Lloyd Blood & Co., but his position as such agent did not constitute him an agent of the defendants. We submit that the law is correctly stated by Thesiger L.J. in *De Bussche v. Alt* (1). The judgment of Bramwell L.J. in *New Zealand and Australian Land Company v. Watson* (2) is in entire agreement with the law as laid down in *De Bussche v. Alt* (1). In *Mountford v. Scott* (3) it was held that notice to an agent in order to bind the principal must be in the same transaction, and this though the agent acted as attorney for the vendor and vendee. In *Warrick v. Warrick* (4) Lord Hardwicke, referring to the rule that notice should be in the same transaction, said at p. 294: "This rule ought to be adhered to, otherwise it would make purchasers and Mortgagees' titles depend altogether on the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions."

[They also referred to *Lockwood v. Abdy* (5), *Cartwright v. Hateley* (6), *Montagu v. Forwood* (7), *Schmaling v. Thomlinson* (8), *Wilde v. Gibson* (9).]

*Murphy K.C.* (in reply):—

The present case is clearly distinguishable from the *New Zealand and Australian Land Company v. Watson* (2). *Rossiter v. The Trafalgar Life Assurance Association* (10) recognizes the position of insurance companies in relation to sub-agents. *Lockwood v. Abdy* (5) is of no assistance in the present case. Martin was clearly brought into

(1) 8 Ch. D. 286

(2) 7 Q.B.D. 374

(3) 3 Madd. 34

(4) 3 Atk. 291

(5) 14 Sim. 437

(6) 1 Ves. Jr. 292

(7) [1893] 2 Q.B. 350

(8) 6 Taunt. 147

(9) 1 H.L.C. 605

(10) 27 Beav. 377

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privity with the defendants. The conduct of the parties and the usage of trade imply the authority to appoint sub-agents. The present case is distinguishable from *Taylor v. Yorkshire Insurance Co.* (1), where the plaintiff knew that the sub-agent was fully acquainted with all the material facts.

We submit that we are entitled to judgment on the findings of the jury.

*Cur. adv. vult.*

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ANDREWS, L.J., having stated the facts, continued:— Various defences were put forward to the plaintiff's claim; but, having regard to the course of the trial, the findings of the jury, and the arguments addressed to us, it may now be said that the defendants seek to escape liability solely on the ground that at the time the insurance was being effected the plaintiff had, contrary to their common law duty and to condition 1 of the policy, omitted to inform them of a fact material to be known for estimating the risk, namely, that the plaintiff's house had been previously burnt down in October, 1922, and that the Commercial Insurance Company of Ireland, with whom the insurance was then effected, had settled the claim by payment to the plaintiff of the sum of One thousand five hundred and fifty-eight pounds ten shillings.

As the defendant company had admittedly no actual notice of the previous fire when they issued the plaintiff's policy their liability depends upon whether Martin's knowledge of such fire, acquired prior to his appointment by Lloyd Blood, and which he states was present to his mind when negotiating the defendants' policy, should be imputed to the defendants.

Before considering this question, which is really a legal one, it is necessary to consider the material findings of the jury, none of which was really challenged in the arguments before us, and all of which are, in my opinion, supported by sufficient evidence.

[His Lordship then stated these findings, which are already embodied in this report.]

On these findings the learned Lord Chief Justice abstained from giving judgment for either party, and both

parties have accordingly moved this court for judgment. In his report of the trial the Lord Chief Justice tells us that after the jury retired Mr. M'Gonigal for the defendants asked to have the further question submitted to them: "Was Martin agent for the defendants?" Mr. Lowry objected to this question on behalf of the plaintiff, and the learned judge ruled that Martin may be agent in law through Blood, but that on both sides the evidence was that he did not communicate directly or indirectly with the defendants. He accordingly left the questions as settled.

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If I rightly understand the ruling of the learned Lord Chief Justice to be, as I believe it to be, that Martin might in certain circumstances be a sub-agent of the defendants in law through the medium of Blood as direct agent even though the evidence on both sides was that he did not communicate directly or indirectly with the defendants, I respectfully agree with the ruling. At the same time I am of opinion that the plaintiff was not entitled to a verdict and is not now entitled to our judgment without an affirmative finding supported by proper evidence on some such question as Mr. M'Gonigal suggested. This question could either have been submitted to the jury in general terms accompanied by a proper and adequate direction that the class of agent referred to in the question was one between whom and his alleged principal direct privity of contract existed, or it could have been broken up into more detailed questions, from the answers to which the conclusion of agent or no agent would have followed as an inference of law.

The fundamental principle of the law of agency—that upon which the whole structure is based—is expressed in the maxim *Qu facit per alium facit per se*. Before one person can be made liable for the act of another, whether that other be called an agent or a sub-agent, it must be established that the act of the latter is in law the act of the former. In other words, the agent or sub-agent, as the case may be, must do the act for the principal. From this it necessarily follows that the act must be performed by the agent or sub-agent within the scope of his authority. If it be done outside the scope of his authority it is in law his own act and not the act of the principal.

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It is established by an overwhelming mass of authority that to render a principal liable for the acts of a sub-agent two matters must be established :—

- (a) That the agent had either express or implied authority from his principal to delegate his authority and to appoint a sub-agent; and
- (b) That the agent had express or implied authority from his principal in making such appointment to constitute the relation of principal and agent between the principal and such sub-agent, or, in other words, to establish privity of contract between them, and that it was the intention of the agent and sub-agent that such relation should be constituted.

If the second point be not established, rights and obligations arising out of contracts between principal and agent, and between agent and sub-agent, can only be enforced by and against the immediate parties to such contracts. Perhaps I should add that the general rule is that there is no privity of contract between the principal and sub-agent; and the onus, accordingly, lies on the party who alleges such privity to establish that it exists.

Now it is clear in the present case that no authority was expressly conferred by the defendants on Lloyd Blood to appoint a sub-agent. At the same time, it seems to me that Gribble's evidence as to the usage of the insurance business, and, particularly, as to his knowledge of the practice of his own company's agents in appointing sub-agents, fully justify the inference that Lloyd Blood had implied authority to appoint a sub-agent. This view was, in my opinion, taken by the jury in their findings upon questions 3 and 4 and the supplemental question submitted to them. This, however, only satisfies the first of the two requirements which I have mentioned. It carries the matter no further than this that it permits or authorizes the agent to get some of the work done for himself through the medium of such sub-agent instead of doing it personally. In other words, the defendants could not successfully contend that either the appointment of the plaintiff as a sub-agent or the performance of certain duties connected with the insurance by such sub-agent amounted to a breach of Lloyd Blood's agency agreement. It does not bring the plaintiff and the defendants into direct touch with one

another; it establishes no privity whatever between them.

An illuminating passage on the subject of the classification of agents and their authority was cited to us by Mr. Whitaker from *Welford & Otter-Barry's Law of Fire Insurance*, 2nd Edit. 84: "The authority," it states, "of any particular agent to bind the insurers varies according to circumstances, but three classes of agents may be distinguished, namely:—

- " (a) Agents who introduce business to the insurers in return for a commission;
- " (b) Agents who are employed to conduct the negotiations on behalf of the insurers; and
- " (c) Agents who stand in the place of the insurers."

The learned authors point out that an agent of the first class is not in any real sense of the word an agent of the insurers. He is merely employed to obtain business and to transmit proposals. Apart from this he has no authority to bind them by anything which he may do, nor can his knowledge of any material fact be imputed to them *Bancroft v. Heath* (1). In all other respects he is to be regarded as agent of the proposer. An agent of the second class principally differs from one of the third class in this that the authority of the former does not extend to accepting proposals, though he may be authorised to bind his principals provisionally by the issue of a cover note. The latter has, on the other hand, full authority to take the place of the insurers who are bound by his acts or omissions in the same way as if they were their own.

In my opinion this passage draws a perfectly accurate distinction between various classes of so-called insurance agents; and I entirely agree with Mr. Whitaker when he says that, on the facts proved in the present case, Martin falls within the first class. Whilst it is possible, as Mr. Murphy pointed out in his persuasive and forcible reply, that Martin had learnt the name of the defendant company through the balance sheet which was forwarded to him by Lloyd Blood on 5th September, I have no reason to disbelieve Gribble's evidence for the defendants when he says that the defendants never knew till after the fire that Martin was acting as agent. Indeed, until then they had never even heard of Martin. The jury were, therefore,

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perfectly right when they found that Martin was acting as agent for Lloyd Blood; and, whether he be referred to as an "agent," or, as Mr. M'Gonigal called him, a "tout," or whether we adopt Gibson J.'s designation in *Taylor v. Yorkshire Insurance Co.* (1) of "canvasser," his duties were of the limited character indicated, and were owed to Lloyd Blood alone, and not to the defendants. I am, therefore, clearly of opinion that the defendants are entitled to succeed on the first ground submitted by Mr. M'Gonigal, namely, that Martin was not their agent; that his knowledge of the previous fire, whenever acquired, could not be imputed to them; and, accordingly, that the plaintiff must be held to have made such a concealment of a material fact as relieves the defendants from all liability under the policy.

This conclusion is sufficient to entitle the defendants to our judgment; but, having listened to the able arguments which were addressed to us, and, having carefully considered the relevant authorities, I feel it my duty to express my clear opinion that the defendants are also entitled to succeed on the ground relied upon by Mr. M'Gonigal when he sought a direction at the close of the plaintiff's case, namely, that even if Martin was the defendants' agent, his knowledge could not be imputed to them as it was acquired prior to his appointment as agent. On this issue many cases might be cited, but the latest and most authoritative decision is *Taylor v. The Yorkshire Insurance Co., Ltd.* (1), a case which may be distinguishable from the present, as Mr. Murphy pointed out, in certain of its facts, but which in my opinion is indistinguishable in principle. I do not intend to cite passages at length from the judgments of Palles, C.B., and Gibson, J. It is enough for me to say that these judgments are founded on the same fundamental principle as that to which I have already referred, namely, that the responsibility of the principal for the act of his agent is limited to an act done within the scope of the latter's employment. There is no distinction between the act in or by which knowledge is acquired and any other act; and, accordingly, all knowledge acquired by the agent when acting within the scope of his employment is the

(1) [1913] 2 I.R. 1

knowledge of the principal. Knowledge, on the other hand, acquired by the agent antecedently to his becoming agent could not be acquired within the scope of his employment, and ought not, therefore, to be imputed to his principal. The danger of making the agent's memory of bygone transactions a jury question is obvious, and recollection or forgetfulness by the agent of matters known to him previous to that relation is not allowed to affect the liability of the principal except in certain well-recognised cases, of which the present is not one. To affect a principal with imputed knowledge there must be not merely a moral duty but a legal obligation on the agent's part to communicate, and no such legal duty could exist in respect of knowledge acquired prior to the agency appointment. I must add that in my opinion Taylor's case is not in any way in conflict, as was suggested, with *Bawden v. London, Edinburgh & Glasgow Assurance Company* (1), for, as Palles, C.B., point out, Quin, the company's agent in that case, saw that the plaintiff had only one eye when the plaintiff applied to him to be insured, and knowledge so acquired when acting within the scope of his authority was properly imputed to the Company.

For these reasons I am of opinion that the defendants are entitled to judgment in the action with costs. We treat the plaintiff's and defendant's motions in this court as one application, and declare the defendant entitled to his costs of same as part of his costs of action.

BEST, L.J., having reviewed the facts of the case, continued :—

The Lord Chief Justice refrained from giving judgment for either party and left the parties respectively to move the Court of Appeal for such judgment as they might respectively be entitled to on the findings of the jury. Various defences to the action had been pleaded but two matters, and two only, were in issue before this court :—

(a) It was argued for the plaintiff that Martin & Company had been agents for the defendants and had privity of contract with the latter, and for the defendants it was denied that this could be so; and

(1) [1892] 2 Q.B. 534

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(b) It was further contended for the defendants that even if Martin & Company should be held to be their agents and to have privity of contract with them, yet the knowledge of Martin as to the occurrence of a previous fire could not be imputed to them, inasmuch as such knowledge was acquired by Martin prior to his having become their agent.

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The personal qualifications and the standing and character of an agent are invariably, or at any rate frequently, of great importance in the making of a contract of agency, and as a general rule the agent is therefore deemed to undertake that he will personally exercise the authority conferred upon him in the absence of any provision to the contrary, and where powers are given to an agent on the understanding that he will exercise them himself he cannot delegate such powers to another person : *Delegatus non potest delegare*.

In this case most careful provision was made in the appointment of Lloyd Blood & Company, as the agents of the defendants, as to the limits of the authority to be exercised by them, and their powers and duties as such agents. Mr. Murphy, for plaintiff, argues on the authority of *Rossiter v. The Trafalgar Life Assurance Association* (1) that although the agent in that case (Marmaduke Constable) had no authority to appoint a sub-agent, and although the insurance on the life of Frederick Strange was effected through Erlam & Williams, who at best could be regarded only as sub-agents for Constable, yet the defendant association was held liable. The facts, however, in that case were very peculiar and differed in many respects from those in this case. It appears from the judgment of Sir John Romilly, Master of the Rolls, that a power of attorney was granted by the company to Constable to grant policies upon first class lives for sums not exceeding £2,000, and where that was communicated to the Central Office in London, the company might either confirm or reject it, that the rejection dated from the period when the notice of the rejection was received out in Sydney; but, in the meantime (provided that the policy was within the terms of the power), it was valid. His

Honour, after stating that it is quite true that an agent cannot delegate his authority to another person but that an agent is entitled to perform and must necessarily perform a great number of his acts and functions through the aid of persons to whom he delegates his authority, proceeds to state in detail what took place on this occasion.

After enumerating various steps in the transaction he says: "But the material document of all is the reference to the medical officer, which is, in the regular form, used in all these documents, with the printed certificate with the words 'Erlam & Co.' added, and that is regularly answered by the medical officer in the ordinary form, and transmitted to the office. The company omits to state from whom it received this document, but say that they received it in London in August, 1855, for the first time. The officer of the company must know from whom they received it, and therefore it is to be inferred that they received it regularly from their agents in Sydney, because, in a matter of this description, their silence must be taken most strongly against them," and the Master of the Rolls further states that the documents sent to the office were the four documents usually sent. In these circumstances and with these facts proved the company was held liable, as it could not be gainsaid that Erlam & Williams were brought into privity of contract with the defendants. Compare the facts in that case with those in the present case.

His Lordship having referred to the evidence given by Martin on behalf of the plaintiff, continued:—

In face of this evidence, I entirely fail to see how Martin & Company were agents for defendants, or were in any way brought into privity of contract with them. If confirmation of this conclusion be necessary it is found in the principles laid down in *De Bussche v. Alt* (1); *Thesiger*, L.J., delivering the judgment of the court of appeal at p. 310 of the report says: "As a general rule, no doubt, the maxim *Delegatus non potest delegare* applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim when analysed merely imports that an agent cannot, without authority from his principal, devolve upon

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another obligations to the principal which he has himself undertaken to personally fulfil; and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract." Further on the Lord Justice states the conditions under which the rule may be relaxed and says: "We are of opinion that an authority to the effect referred to" (i.e., an authority to enable the agent to appoint what has been termed a sub-agent or substitute) "may and should be implied where from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute, and that when such authority exists, and is duly exercised, privity of contract arises between the principal and substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself."

The passage just cited about the conduct of the parties, the usage of trade or the nature of the particular business which is the subject of the agency was strongly relied on by Mr. Murphy in reply, who argued that the present case came within one or more of these categories, but I cannot agree that there is anything in the case from which it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist or that in the course of the employment unforeseen circumstances arose which imposed upon the agent the necessity of employing a substitute. I think it unnecessary to examine the other cases which were cited on this point. I am clearly of opinion in the circumstances of this case that Martin was not the agent of defendants and was not brought into privity of contract with them. If, however, this conclusion is not warranted and it should be the case that Martin was the agent of the defendants the question remains about Martin's knowledge that a fire had previously occurred in the house whose destruction is the

subject matter of the present action. Can such knowledge in Martin, assuming he is the agent of defendants, be imputed to them? *Bawden v. London, Edinburgh & Glasgow Assurance Company* (1) and *Taylor v. Yorkshire Insurance Company* (2) will supply the answer. In the former, which Lord Esher refers to as the case of the one-eyed man, all three judges in the Court of Appeal say that the agent of the company whilst filling up the proposal form for Bawden, who was stated to be illiterate, saw that he had lost the sight of one eye and Kay, L.J., at p. 542 says: "That knowledge was obtained by him" (i.e., by the agent) "when he was acting within the scope of his authority, and it must be imputed to the company."

Again, in *Taylor v. Yorkshire Insurance Company* (2) the Lord Chief Baron, at p. 20 of the Report, says: "The general principle subject to exceptions, to which I shall advert later on, upon which knowledge of an agent is deemed the knowledge of his principal, is the familiar one of *qui facit per alium facit per se*. Every act of an agent, within the scope of his authority, is the act of the principal. Consequently, all knowledge acquired by the agent when acting within the scope of his authority, is the knowledge of the principal." Further on he says: "It follows that knowledge acquired by the agent antecedently to the existence of the relation of principal and agent ought not to be imputed; and recollection or forgetfulness by the agent of matters known previous to the relation ought not to affect the liability of the principal, save in cases (of which many can be supposed, but of which this is not one) in which the principal purchases the previously obtained knowledge of the agent in relation to a particular subject matter, or where the agent is—to use the emphatic words of Lord Halsbury—"an agent to know." The learned Lord Chief Baron then discusses the exceptions to the general principle none of which have, in my judgment, any application to this case.

To the same effect is the judgment of Gibson, J., who at p. 30 of the Report says: "To affect a principal with imputed knowledge there must be a duty on the agent's part to communicate. How was Scollen under any legal obligation to defendants to remember the incident of

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(1) [1892] 2 Q.B. 534

(2) [1913] 2 I.R. 1

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February, 1908? Can the defendants' contractual rights depend on the accident of Scollen's recollection, or his forgetfulness, or oversight? He was a canvasser, and his employers required the protection of written answers. The danger of making the agent's memory of bygone transactions a jury question, and enabling contractual obligation of full disclosure to be thereby qualified or reduced, is obvious. To reach the employer, the knowledge must be got in the course of the agency and in such a way as to affect the particular contract. The agent's duty to inform his principals must be not merely a moral duty, but a legal obligation, *Wyllie v. Pollen* (1), hence antecedent knowledge obtained before the agency, or casual information detached from the contract, cannot be imputed."

Applying these principles to the facts of the present case it appears to me that even if at the time when particulars for the policy of insurance were being obtained by Martin he was the agent for defendants, and if it were then present to his mind that a fire had occurred in plaintiff's dwelling-house in 1922 such knowledge on the part of Martin could not be imputed to the defendants. I hold, therefore, that plaintiff must fail on both points and that judgment should be entered for the defendants, with costs of the trial and of this appeal.

Solicitors for the plaintiff: *Fisher & Fisher*.

Solicitors for the defendants: *Carson & M'Dowell*.

J. McC.

## THE KING (COUNTY COUNCIL OF TYRONE)

v.

## THE JUSTICES OF COUNTY TYRONE (1).

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Feb., 9-16

*County Court House—Ownership of—Liability of County Council to repair—Towns Improvement Clauses Act 1847 (10 and 11 Vict., cap. 34) s. 75—Memorandum of order in petty sessions book—Subsequent full order shewing jurisdiction validly made.*

The Surveyor of O. Urban District Council pursuant to section 75 of the Towns Improvements Clauses Act, 1847, gave notice to the county council of T. requiring them to take down, rebuild and repair the wall and railings of the county court house. The county council did not comply with this notice whereupon the surveyor issued a summons, which was heard before the justices, who made an order which, as it appeared in the petty sessions book, ordered the county council within four months to take down, rebuild and repair portion of the wall and railings of the O. County Court House.

*Held* that the county council were "owners" of the county court house within section 1 of the Towns Improvement Act, 1854, although control of the court house for administrative purposes vested in the high sheriff.

*Held* further that words "take down, rebuild, and repair to the satisfaction of T. H." did not involve an ambiguity so as to render the justices order bad for uncertainty.

And *Held* that, although the justices order was made at petty sessions and entered in the petty sessions book, the order, not being made under the Petty Sessions Act but under a separate code, the entry in the order book was merely a memorandum and that there was power in the justices to draw up subsequently a full order shewing jurisdiction on its face.

MOTION to make absolute a conditional order of certiorari dated the 20th December, 1927, whereby it was ordered that the proceedings in a complaint by the Surveyor of the Omagh Urban District Council against the County Council of the County of Tyrone with all proceedings thereon, including an order of the justices at Omagh, dated 21st November, 1927, should be brought up by certiorari to be quashed notwithstanding the cause shown by the Tyrone County Council.

The surveyor on 11th November, 1927, formed the opinion that the wall and railings, part of the court house premises, and abutting on the High Street in Omagh, were in a ruinous state and dangerous to passengers, and thereupon on the 11th November, 1927, gave notice pursuant

(1) In the Divisional Court before Moore, L.C.J., Brown, J. did not sit as he had when Counsel advised in the case.

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to section 75 of the Towns Improvement Clauses Act, 1847, requiring the county council forthwith to take down and repair the said wall and railings, and informed them that if within three days they did not begin to take down and repair the wall and railings, he would make a complaint thereof before two justices. The county council did not comply with this notice, and on the 17th November the surveyor issued a summons, which came to be heard before the magistrates on the 1st of December, 1927, who made an order appearing in the petty sessions book in the following form:—"Ordered that the defendants do within four months take down, rebuild and repair to the satisfaction of the complainant the portion of the wall and railings of Omagh Court House extending from the corner of George Street to the main gate including both pillars." They subsequently made a further order to the same effect, but one which was *prima facie* good in form as it showed the jurisdiction to make the order on its face. The curial portion of this order was in the following terms:—"Now we do order the County Council of the County of Tyrone, the owners of the said premises, within four months from the service of copy of this order, to take down, rebuild and repair to the satisfaction of the said Thomas T. Hamilton, the portion of the said wall and railings commencing at the corner of George Street, and to and including the main gate and both its pillars . . ."

*Murphy K.C.* and *Mugill* for the County Council of Tyrone:—

The putting up of a hoard or fence for the protection of passengers as required by section 75 of the Towns Improvement Clauses Act, 1847, is a test of the Surveyor's bona fides and a condition precedent to the issuing of a complaint before the justices. This was not done in the present case. The entry in the petty sessions book is the order of the justices, and they have no power to amend it by a subsequent order. *R. (Burke) v. Justices of Co. Cork* (1), *R. (Martin) v. Mahony* (2). The original

order does not show jurisdiction on its face and it is not stated whether it is made against the county council as owners or as occupiers of the court house. The county council are not owners of the court house within the meaning of section 3 of the Towns Improvement Clauses Act, 1847. Section 72 (3) of the Local Government (Ireland) Act, 1898, gives the use of the court house to the county council subject to the powers of the high sheriff, and for administrative purposes the control of the court house is vested in him, *R. (Jackson) v. The County Council of Sligo* (1), *The Donegal County Council v. Herdman* (2). It is not necessary for us to show in whom the property is vested; it is sufficient for us to show that the county council are not the owners. The words "take down, rebuild and repair" are ambiguous, and render the order bad for uncertainty.

[They also referred to *R. (Ahern) v. Recorder of Cork* (3).]

*Babington K.C.* (Attorney-General) and *Sheil* for the respondents:—

This case does not come within the Petty Sessions Act 1851, *R. (de Vesci) v. The Justices of Queen's County* (4). Section 39 of the Towns Improvement (Ireland) Act, 1854, incorporates section 75 of the Towns Improvement Clauses Act, 1847. It is enacted by section 41 of the Local Government (Ireland) Act that the Act of 1854 shall, subject to certain exceptions, apply to all towns having commissioners under the Lighting of Towns (Ireland) Act, 1828 (9 Geo. 4 c. 82) which applies to Omagh—Vanston's Local Government, 1915, vol. 1, p. 138. The effect of this is that the order was not made under the Petty Sessions Act, and consequently the entry in the order book is not the order. The magistrates can extend this entry in drawing up their order. *R. (Murphy) v. Wexford Justices* (5), *R. (Ewing) v. Justices of Down* (6).

(1) 34 I.L.T.R. 49 (2) 1 N.I.J.R. p. 105 (3) [1913] 2 I.R. p. 35  
(4) [1908] 2 I.R. p. 285 (5) [1894] 2 I.R. p. 81 (6) [1905] 2 I.R. p. 648

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Ownership of the court house is in the county council. Under section 72 of the Local Government (Ireland) Act, 1898, the county council may use the court house for the purpose of their duties. Under section 69 of the Grand Jury (Ireland) Act, 1836, the grand jury is authorized to levy rates for the repair of the court house. This duty is mandatory, *R. (Jackson) v. County Council of Sligo* (1). By virtue of article 15 (1) of the Application of Enactments Order, 1898, the property of the grand jury passed to and vested in the county council. The result of this is that county court houses vested in the county councils; in these circumstances the prosecutors were correctly described as owners in the justices' order. Ownership cannot be in the high sheriff. He has no fund out of which to pay for repairs to the court house.

[They also referred to *R. (Grant) v. Justices of Louth* (2) and *R. (Coyle) v. Justices of Tyrone* (3).]

*Magill* (in reply).

*Cur. adv. vult.*

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MOORE L.C.J. (having stated the facts): Mr. Murphy contended before me that the order of the justices was made without jurisdiction, and secondly, that it was bad in law as being uncertain and ambiguous. In support of his first contention he relied on the following matters, firstly that it was a condition precedent to the issuing of a complaint before the justices that the surveyor should cause a proper hoarding or fence to be put up for the protection of passengers, and that this had not been done in the present case; secondly, that the order of the justices was the original entry in the petty sessions book, and that there was no power to alter or extend it by the subsequent order; thirdly, that the order was bad inasmuch as it was an order against the county council as owners of the premises, whereas in law and in fact they are not such owners. On the second ground he urged that an order "to take down, rebuild and repair to the satisfaction of

(1) 34 I.L.T.R. 49

(2) [1914] 2 I.R. p. 103

(3) 42 I.L.T.R. 26

the said surveyor " was in itself uncertain and void for ambiguity, as railings could not be rebuilt, and after the wall was taken down it could not be said to be capable of repair.

As to the first point, I am of opinion that section 75 on its true construction does not make the erection of a proper hoard or fence a condition precedent to the right of the surveyor to make complaint before two justices. It is quite right that the owners or occupiers should have notice in writing of what they are required to do before such complaint is heard, so as to give them an opportunity of considering their position; but I can see no reason why the surveyor should be compelled before such complaint to erect the hoarding. The section imposes upon him both the power and the duty to do so, and he should do so immediately. At the same time all these matters are within a very short compass of time. The notice is only a three days' notice. In certain circumstances it is quite easy to imagine that the hoarding could not be erected within three days. The complaint before the justices follows immediately after the three days, and the surveyor might find himself in an unfortunate position if, having exercised his power and put up a hoarding, his complaint was dismissed by the justices within a very short space of time, thereby throwing on him the duty of taking it down; and I do not see what cause of complaint the owners could have against him for not putting the hoarding up. At the same time I am not to be taken as suggesting that it is not his duty to the public reasonably to comply with the statute, and he may incur considerable risk in not doing so: but I cannot see how breach or neglect of such a duty to the public would go to the jurisdiction of the justices to order the respondents to take down or repair, on the ground of default on their part. For these reasons I think the first ground of objection fails.

The second ground, namely, that the order in the justices' order book is the real order, depends upon the question of the code under which the justices purported to make it. It is perfectly true that the order was made at petty sessions, and is so entitled and that the entry in the order book headed " Petty Sessions District of Omagh " purports to comply with the Petty Sessions Act;

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but the Attorney General has satisfied me that in fact this order is not made under the Petty Sessions Act, but under what I may describe as a separate code of its own. Section 75 of the Act of 1847 was incorporated by the Towns Improvement Act (Ireland) of 1854, section 39, and it would appear from the note in Mr. Vanston's Local Government, 2nd edition, vol. 1, page 138 that this statute applied to the town of Omagh. A corresponding jurisdiction exists under the Public Health Act *R. (Ewing) v. Justices of Down* (1), and an order made by the magistrates though sitting at petty sessions under the Public Health Act abating a nuisance is not treated as a Petty Sessions Order, but as an order under the Public Health Act, not within the Petty Sessions Act of 1851. In *R. (de Vesci) v. The Justices of Queen's County* (2) the application was made at petty sessions, but Gibson J. held that the order made by the magistrates was outside the Petty Sessions Act. There a contractor sought an order from the magistrates to enter on lands for the purpose of obtaining road material. Similarly (I quote from the judgment of O'Brien, L.C.J., afterwards Lord O'Brien, in *R. (Murphy) v. Wexford JJ.* (3), in reference to a like order): "It is made under the authority of the particular section of the Grand Jury Act . . . but the petty sessions procedure could be and was utilized in the sense that it was adopted as a convenient mode of bringing the parties into court, of hearing the evidence, and of making a minute of what took place, until the final order . . . should be made up." Again in *R. (Garvey) v. Armagh JJ.* (4) an application to compel a person to give security for good behaviour, Sir James Campbell, L.C.J., held that although an application was made to the magistrates at petty session yet it was not by virtue of their summary jurisdiction, but under the powers of their commission that the order was made. It is true that that decision was subsequently reversed in *R. (Redmond) v. Jellett* (5), but solely on the ground that the Interpretation Act of 1889 had not been brought to the

(1) [1905] 2 I.R. 648 (2) [1908] 2 I.R. 285 (3) [1894] 2 I.R. at p.81

(4) [1918] 2 I.R. 94 (5) [1919] 2 I.R. p. 79

notice of the court. This does not affect the principle as I have stated it.

The Attorney General satisfied me, following the ratio decidendi in Ahern's case (1), decided on the present statute, that the proceedings in the present case, just as in the others that I have mentioned, are brought under a separate code not covered by the Petty Sessions Act of 1851. This being so, the entry in the order book is not the order as it would be under the Petty Sessions Act, but merely a minute or memorandum of it, and there was power in the justices to draw up subsequently as a record a full order setting out, as the present order does, facts necessary to confer jurisdiction on an inferior court to deal with the matter before them. I am, therefore, of opinion that this point also fails.

The next ground relied on by Mr. Murphy was that the county council are not "the owners" of the court house. He suggested that the true ownership lay in the high sheriff; he was not bound to show in whom the title lay; it was enough for him to establish the proposition that the county council are not the owners. In support of this contention he referred to several cases establishing the authority of the high sheriff and suggesting that for administrative purposes the control of the court house is vested in that official. I can quite understand the origin of this proposition of law. In particular he relied on the Lifford case, *Donegal County Council v. Herdman* (2). Prior to 1898 the body administering the finance of the county had no continuing existence. The members of the grand jury were summoned by the high sheriff, subject to certain qualifications, at his own pleasure, and when at the assizes they were discharged by the judge they ceased to exist until called into being again by the same officer, or his successor, at the next assizes. They had no corporate capacity; see *Palles C.B. R. (Clements) v. Tyrone JJ.* (3). On the other hand, the high sheriff remained in office for a year, as at present, or until his successor was sworn in, and to some extent had a much more extended tenure than the grand jurors. He was a very high executive officer, and it was entirely proper that in the

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(1) [1913] 2 I.R. p. 35

(2) 1 N.I.J.R. 105

(3) [1905] 2 I.R. p. 415

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interests of the administration of justice the permanent control of the court house should be vested in such an officer. The repairs and maintenance of the court house however were carried out by presentment from the grand jury, which were fiatd by the judge. Since 1898, however, elected representatives of the people are chosen as a county council, who remain in office for three years. They are constituted a corporation (1). Under section 72, ss. (3) of the Local Government Act of 1898, this body has the use of the court house for its own purposes, and also under ss. 69 and 73 of the Grand Jury Act of 1836 the obligation to maintain and keep it in repair (see Vanston, vol. 1, p. 105). In fact they are the only people who can obtain the public moneys necessary for so doing. I think it would be absurd to hold, if it was ever argued, that the high sheriff should be personally liable for the repairs to the court house. I, therefore, do not wish to be taken as in any way derogating from the principles of the common law as laid down in the judgments already referred to, or from the statute which preserve to the high sheriff his existing rights in respect of the court house, as between himself and the county council, or members of the public; but when I find the county council in authorized possession and the sole persons with statutory power to raise moneys for repair, and with the duty cast on them of doing so, and while they are probably within the statutory definition of the Act of 1847, I think I must hold that they come within the definition of "owner" in section 1 of the Towns Improvement Act (Ireland), 1854. For these reasons I think that they were rightly described in the order complained of as owners.

The remaining ground, that the order is bad for uncertainty, is, I think, also untenable. The main argument was that one could not "take down" and at the same time also "repair," and the words were not put in the alternative. I pointed out that the argument for uncertainty might derive greater force if words were alternative. In my opinion it was not intended that the magistrates should form themselves into an expert body of architects or engineers and specify in detail what structural work was to be done. Section 75 in terms

(1) Application of Enactment Order 1898 Article 13 (1)  
1 Vanston p. 182

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says: that when the owner is ordered to take down, rebuild or otherwise secure the premises complained of, it is to be "done to the satisfaction of such surveyor," and this I think throws upon the surveyor and not upon the magistrates the duty of seeing that such works as may be necessary are carried out. *Id certum est quod certum reddi potest.* For these reasons I think there is not any such ambiguity of uncertainty in the order as would make it fail on this ground.

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I therefore think that the conditional order of certiorari should be discharged, and I direct the County Council of Tyrone, the prosecutors, to pay the costs.

Solicitors for prosecutors: *Dickie & Carson.*

Solicitors for respondents:—*Shields & Murnaghan.*

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## CUNNINGHAM v. NORTHERN BANKING CO., LTD.

June 30, 31  
Feb. 1, 9

(1927. No. 280).

*Cash order—Stockbroker—Fraudulent dealing—Insolvency of stockbroker—Proceeds of cash order—Circumstances leading to inquiry—Abstention from inquiry—Notice—Transaction not in ordinary course of business.*

S. & Co., a firm of stockbrokers, sold for the plaintiff £1,000 five per cent. war loan stock. At the time of the sale S. & Co., had overdrawn their account with the defendants by £2,300, thereby exceeding by £300 the limit up to which they had permission to overdraw. M., the defendants' manager, having heard rumours of the insolvency of the firm had an interview with C., a member of the firm, who then estimated their liabilities at from £30,000 to £40,000, and said it would be difficult to meet their clients who were pressing. On the following day M. obtained from C. a cash order for £999 10s 0d, the proceeds of the sale of the plaintiff's stock, which M. placed to the credit of the firm's account. M. in his evidence stated that the bank did not make inquiries about cash orders, and that he had no knowledge that the money represented the plaintiff's money, and added that on seeing the documents, contract certificate and transfer, as a banker he would assume that they were the property of C. as they came from his custody, even though he was a broker. C.'s account of the interview was that M. told him that his overdraft exceeded the limit by £300, and urged him to reduce it to the authorized amount, and asked him had he any cheques which he could send down, to which C. replied "No."

In an action by the plaintiff to recover the proceeds of the sale from the banking company, the jury found that the defendants ought to have known that the proceeds of the cash order were the property of the plaintiff, and that C. was not entitled to lodge the money to his own account.

The Court of Appeal (Andrews and Best L.JJ.) affirmed the decision of Moore L.C.J., who had entered judgment for the plaintiff, and held that the defendants, who through their manager were aware of C.'s state of insolvency, either knew the full facts regarding the cash order, or though put on inquiry wilfully shut their eyes, and were affected by, and in law privy to, their customers fraud.

MOTION by the defendants for an order that the verdict and judgment entered for the plaintiff be set aside and that judgment be entered for the defendants or in the alternative that a new trial of the action be directed.

The question involved was the liability of the defendants to pay to the plaintiff the sum of £999 10s 0d, the proceeds of the sale of £1,000 of War Loan, which the plaintiff in-

structed his stockbrokers, the Messrs. Chadwick, who carried on business in Londonderry under the name of Messrs. James Stewart & Co., to sell for him. The sale was effected on 9th November, 1926; and on 18th November the defendants' manager, Mr. Mitchell, with knowledge of the brokers' insolvency, obtained from them a cash order for £1,000, representing the price of the plaintiff's stock; and, thereupon, before the bank had even collected the amount from the purchaser, Thompson, who resided in Glasgow, he placed this sum to the credit of the brokers' account in reduction of their then overdraft of £2,300.

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At the trial, which took place before the Lord Chief Justice and a Common Jury of the City of Belfast, two questions were submitted to the jury:—“(1) Did the bank know or ought they to have known on November 18th that the proceeds of the cash order were the property of the plaintiff? (2) Did the bank know or ought they to have known that in the circumstances Chadwick was not entitled to lodge Cunningham's money to his own account?”

To both of these questions the jury brought in the same answer: “They ought to have known”; and upon these findings the learned judge gave judgment against the defendants.

In reply to Mitchell's inquiry as to whether Chadwick had any cash orders which he could send down to the bank, he said he had only one of £1,000 for Cunningham. Mitchell, in a letter to the directors, dated 18th November, stated that on the previous day he had heard a rumour that Chadwick's firm had got into the position of not paying their liabilities, and that accordingly he went to see Chadwick in reference to the matter. At that interview Chadwick informed Mitchell that his firm were in financial difficulties to the extent of twenty, thirty or forty thousand pounds.

Chadwick's account was that Mitchell said to him: “Your overdraft has been exceeded by £300,” and that he asked him if he could not get this reduced to the authorised amount, as the junior clerk might get into trouble. “He asked me, had I any cheques I could send down? I said, ‘No.’ I called in my clerk Miss Beattie and asked her if any cheques had come in since, to which Miss Beattie

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said that none had come in. Mitchell then said: 'Have you any cash orders you could send down?' I said there was only one, and that was £1,000 for plaintiff. Mitchell then asked, 'Have you got one for a smaller amount?' I said, 'No.' Mitchell then said, 'Send this one down.' In addition, Chadwick said positively that he mentioned Cunningham's name to Mitchell. Chadwick was corroborated by the clerk, Miss Beattie. Her evidence was that she was sent for to the private office. She was asked by Chadwick if she had any cheques to lodge, and said, No. She was asked by Mitchell had she any cash orders to send down, and Chadwick said there was one for one thousand pounds sold for Cunningham. She said that the cash order was not made out at the moment, and that Mitchell said the junior would get into trouble over the £300, and asked Miss Beattie had she not a smaller cash order, and she said, No. Chadwick then told her in Mitchell's presence to bring it down to the bank. She made out the cash order. Chadwick signed it, and subsequently on the same day the cash order was brought to the bank.

Mitchell admitted that he went to see Chadwick in the latter's office. He asked Chadwick if he had a lodgment to make as his account was out of order. He said he had. Mitchell said he had spoken to him before. He said it was not nice for him or any other official to have his account out of order. Chadwick went to the door and said, "Miss Beattie, lodge that war stock." Mitchell said that as regards future overdrafts he would get into trouble. They sat down at the table. Mitchell asked Chadwick about the rumour as to his embarrassment. Chadwick said it would be difficult to meet his clients who were pressing. He estimated his liabilities at about £30,000 to £40,000. Cunningham's name was never mentioned, nor was it mentioned that Chadwick had been engaged in business for Cunningham. Mitchell denied that Chadwick said that "the only order that he had was one for one thousand pounds the property of Cunningham." Mitchell did say that a smaller lodgment would do, and said certainly he did not mention Cunningham. Mitchell said he had not seen the transfer, certificate, or cash order, and that when a cash order is lodged the bank treat it as a cheque.

*Babington K.C.* (Attorney-General), *Lowry K.C.* and *Dougherty* for the appellants :—

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We were entitled to a direction at the close of the plaintiff's case. A person who takes money from his debtor in discharge of a debt is not under ordinary circumstances bound to inquire into the manner in which the debtor acquired the money with which he pays it. *Thomson v. Clydesdale Bank Ltd.* (1). It would be impossible for bankers to carry on business if inquiries had to be made in each case as to the ownership of money or securities lodged with them by their customers. The possession of the certificate and the signed transfer entitles the broker to receive the purchase money. Mere notice or knowledge of insolvency in a general way was not notice that the particular lodgment was not the property of Messrs. Stewart. The bank manager could not have supposed that Stewart & Co. were misapplying clients' monies. This was the last of a series of lodgments coming in day after day in the ordinary course of business. The evidence went no further than that the cash order was in respect of stock formerly the property of the plaintiff. We rely on *Hone v. Boyle* (2), where Lord Ashbourne C. said at p. 158, "The person who must sustain the loss is the person who has misplaced his trust and confidence." We rely also on the speeches of Lord Halsbury C., Lord Watson, and Lord Herschell in *Colonial Bank v. Cady* (3).

The defendants were entitled to assume either that the money was lodged with the plaintiff's consent, or that it was the broker's money. There is nothing in the case to entitle the jury to assume that the money was the plaintiff's or that Messrs. Stewart & Co. had not authority to lodge it. The Lord Chief Justice should have directed the jury to find for the defendants.

(1) [1893] A.C. 282                      (2) 27 L.R.I. 157, 151  
(3) 15 A.C. 267

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If the person receiving money has reason to believe that the payment is being made in fraud of a third person, the person taking such a payment would not be entitled to retain the money. *Thomson v. Clydesdale Bank Ltd.* (1).

We rely on *Earl of Sheffield v. London Joint Stock Bank* (2). In *London Joint Stock Bank v. Simmons* (3) Lord Herschell said at p. 221 "If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry." We rely on the judgment of Byrne J. in *Coleman v. Bucks and Oxon Union Bank* (4). We also rely on *Mulville v. Munster and Leinster Bank* (5). A cash order is not a bill of exchange. It is not a negotiable instrument. *Bavins Junr. & Sims v. London & South Western Bank* (6).

*Babington K.C.* (Attorney-General) in reply :—

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ANDREWS, L.J. : This case, which is stated to be one of great importance not only to bankers but to the commercial community generally, does not appear to me to present any special difficulty.

The learned Attorney General who appeared for the defendants submitted before us, as he did at the trial, that he was entitled to a direction at the close of the plaintiff's case; but, subject to this, he made no objection to the form of the questions as adequate and proper to try the case. At the same time he appeared to take the view that the first question would have sufficed; and in this I am inclined to agree. The second question as to whether Chadwick was entitled to lodge Cunningham's money seems to me to be rather one of law than of fact.

Before considering the evidence in detail it will, I think, be more convenient to summarise the law applicable to the case. In the very full and able arguments

(1) [1893] A.C. 282      (2) 13 A.C. 333      (3) [1892] A.C. 201

(4) [1897] 2 Ch. 243 at pp 246 248 & 252

(5) 27 L.R.I. 379.      (6) [1900] 1 Q.B. 270

to which we had the pleasure of listening I was not able to appreciate any real difference in the principles contended for on behalf of the plaintiff and defendants. This is not to be wondered at as these principles have been repeatedly laid down by both the House of Lords and Privy Council in recent years. The various reported cases merely reaffirm these well settled principles, and afford illustrations of their application to the different facts and circumstances established in evidence.

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Perhaps one of the most concise and accurate statements of the law is to be found in the speech of that great master of legal principle Lord Herschell, C., in *Thomson v. Clydesdale Bank* (1), "My lords," he said, "I cannot assent to the proposition that even if a person receiving money knows that such money has been received by the person paying it to him on account of other persons, that of itself is sufficient to prevent the payment being a good payment and properly discharging the debt due to the person who receives the money. No doubt if the person receiving the money has reason to believe that the payment is being made in fraud of a third person, and that the person making the payment is handing over in discharge of his debt money which he has no right to hand over, then the person taking such payment would not be entitled to retain the money, upon ordinary principles which I need not dwell upon." In illustration of the reasonableness of the first of these propositions Lord Herschell points out how a stockbroker may make advances to his clients in anticipation of sums which he will receive for them; and that in such a case it is perfectly legitimate that, having obtained for that purpose an advance from his bankers, he should pay the money when he receives it for his clients to his bankers for the purpose of reinstating the account he has overdrawn. "It is obvious," he adds, "that the case of the appellants (Messrs. Thomson) wholly fails unless they bring home to the respondents more than has been attempted here, namely, a knowledge that in the particular case the person was not justified in paying over the particular amount. Of course if they prove that there was such knowledge on the part of the bankers, the bankers could not retain it."

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Lord Watson expresses the same principles in different words. "When," he says, at p. 289, "a broker, or other agent entrusted with the possession and apparent ownership of moneys, pays it away in the ordinary course of his business, for onerous consideration, I regard it as settled law that a transaction which is fraudulent as between the agent and his employer will bind the latter, unless he can show that the recipient of the money did not transact in good faith with his agent." Having dealt with the facts of the case he adds:—"It is not enough for them (Messrs. Thompson) to prove that the respondents acted negligently; in order to succeed they must establish that the respondents knew not only that the money represented by the cheque did not belong to the broker, but that he had no authority from the true owner to pay it into his bank account."

The earlier case of *The Colonial Bank v. Cady & Williams* (1) which was referred to at some length by the Attorney General, is only of importance to the present case in so far as it illustrates the necessity in certain cases for recipients of securities or money, such as bankers, to make inquiries into the broker's authority to deal with or to transfer the property to them. The mere fact that the transfers in that case were not signed by the registered owner but by his executors in their executorial capacity was held sufficient to cast upon the bank the duty of inquiring into the extent of the broker's authority to pledge the certificates.

This principle that circumstances may be such as to put the recipient of the property on inquiry is well recognised in many cases. Thus, we were referred by Mr. Murphy to *Sheffield v. London & Joint Stock Bank & Others* (2), where a moneydealer lodged securities with certain banks against advances; and it was held that the circumstances of the case were such as to put the banks on inquiry as to his title or as to the extent of his authority to do so. But it would be dangerous to generalise from this case; for nothing can be clearer than that it turned on its special facts, one of which, as was pointed out in *London Joint Stock Bank v. Simmons* (3), was that the

(1) 15 A.C. 267

(2) 13 A.C., 333

(3) [1892] A.C. 201

court were of opinion that the banks had actual knowledge that the person pledging the securities had only a limited authority to raise money upon them. The only question of law decided in the case was the not very novel one, that a purchaser, even for value, cannot insist on his purchase if he knows that the person from whom he purchases has no right to sell. Lord Halsbury (at pp. 211-2) lays it down in the clearest terms that the mere circumstance that the depositor of the securities was a money-lender, and that he was assumed to be agent for the owners did not put the banks upon inquiry as to his title, for it is not necessary to inquire in every case, whether a known agent has his principal's authority.

In *Hone v. Boyle* (1) where a contest arose between the representative of an innocent client of a bankrupt stock-broker and a bank which made an advance to that stock-broker in circumstances which in no way reflected on their fairness or honour, the loss fell on the former; but before the position of the bank was vindicated the court had to satisfy themselves not only that they had no notice of the plaintiff's title to the shares, the certificates of which had been deposited with them by the broker as security for an advance to him, but also that there were no circumstances in the case which made it proper that they should have made inquiry. Thus Lord Ashbourne, C., says at p. 155: "Were the defendants bona fide holders for value without notice of any such matter as made it reasonable that inquiry should be made by them into the title of the said Joseph Hone (the broker) to make the deposit? That is the real important substantial question to be determined." Again at p. 157, he says:—"Had the defendants the knowledge imputed to them? Were they put on inquiry?"

Passages to the like effect could be cited from the judgment of Fitzgibbon, L.J., at pp. 165, 166 and 173; and it is not unimportant to note that the Lord Justice, having stated that it is admitted that no rule has yet been laid down, however salutary it might be, that the mere fact of a broker's offering shares in pledge should put a banker on inquiry, expresses the view that the only rule is at best a principle of evidence, namely, that according to the circumstances of each particular case the issue of reasonable caution, of good faith, and of the ordinary course

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of dealing between man and man, must be decided as a question of fact.

We were referred to several other cases in argument into a detailed examination of which it would be profitless for me to enter; but there is one other Irish case which was not cited and which appears to me to have a very direct application to the present case. It is the well known case of *Gray v. Johnston* (1). The question in issue was the right of a banker to refuse to pay a cheque of his customer who was an executor. Lord Cairns, C., after a consideration of the authorities, said at p. 11:—"In order to hold a banker justified in refusing to pay a demand of his customer, the customer being an executor, and drawing a cheque as an executor, there must in the first place be some misapplication, some breach of trust, intended by the executor, and there must in the second place, as was said by Sir John Leach in the well known case of *Keane v. Roberts* (2) be proof that the bankers are privy to the intent to make this misapplication of the trust funds. And to that I think I may safely add, that if it be shown that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed." The importance of this question of personal benefit to the bankers is emphasised also in the judgment of Byrne, J., in *Coleman v. Bucks & Oxon Union Bank* (3), though the bank were successful in their defence in that case, as their manager had not the slightest suspicion or reason to suppose that their customer was not in a perfectly good and solvent condition. Chatterton, V.C., in *Mulville v. Munster & Leinster Bank* (4), also attached great importance to the bank's knowledge of the needy circumstances of their customer, who was a stockbroker, and upon this and other grounds distinguished the case from *Hone v. Boyle* (5).

With these settled principles before us let us turn to the proved facts of the present case.

(1) L.R. 3 H.L.

(4) 27 L.R.I., 379 at p. 383

(2) 4 Madd., 357

(5) 27 L.R.I., 137

(3) [1897] 2 Ch., 243

Was there evidence proper to be submitted to the jury that the bank knew or ought to have known on November 18th that the proceeds of the cash order were the property of the plaintiff? If the jury had courageously found that the bank had actual knowledge of this fact I do not think that their verdict could possibly have been impeached, as it would be supported by Chadwick's account of his interview with Mitchell, the bank manager, when in reply to Mitchell's inquiry as to whether he had any cash orders he could send down to the bank, he said he had only one of £1,000 for Cunningham. The jury were entitled to act upon this evidence and upon Chadwick's reassertion in cross-examination that he "did mention Cunningham's name to Mitchell." His testimony on these matters, though challenged by Mitchell, was corroborated by Chadwick's clerk, Miss Beattie. In these circumstances the jury took what has been called the charitable view, and preferred to base their finding on other portions of the evidence. They held that the bank ought to have known that these moneys were the property of the plaintiff. What material had they before them to justify this finding? In the first place they had the evidence of Mitchell himself that a perusal of the documents sent to the bank, namely, the transfer, certificate and cash order, would have shown him that the money was Cunningham's, but, as he says, he didn't trouble to look at them. Under pressure of cross-examination he further admitted that the money was bound to be the proceeds of client's stock, but qualifies this by adding that he thought Chadwick had authority to lodge his client's money. In the next place, the jury had Mitchell's statement in his letter to his directors of 18th November that on the previous day he had heard a rumour that Chadwick's firm had got into the position of not paying their liabilities, and that he, accordingly, went to see Chadwick in reference to the matter on the morning of the 18th. It is common case that at that interview Chadwick informed Mitchell that his firm were in financial difficulties to the extent of twenty, thirty, or forty thousand pounds, though there is some controversy as to whether this was mentioned until after completion of the transaction regarding the cash order. The jury were, however, entitled to hold, as I do not hesitate to say I myself on all the probabilities of

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the case would have held, that the financial position of Chadwick's firm was the first topic touched upon at the interview, and that it was the seriousness of the situation disclosed which led Mitchell to take action to try to secure such a lodgment as would minimize the bank's loss. A further motive in Mitchell's mind also doubtless was that Chadwick's authorized overdraft of £2,000 had been exceeded by £300. Mitchell said he was anxious lest the junior clerk should get into trouble, and that he wanted a lodgment to put the account in order. It is possible also that, as the responsible head of the branch, he had some anxiety as to his own position in regard to this unauthorized excess. These are the circumstances which induced Mitchell to ask Chadwick if he had any cheques to send down, and, on receiving a negative reply, to ask him if he had any cash orders he could send. As a result of this query he received the cash order in respect of the plaintiff's stock; and he admits that he knew it was for the sale of £1,000 War Loan. A cash order so lodged is treated by the bank as a cheque; and the credit which is provisionally given on its lodgment is ratified and confirmed when the money is collected and comes to hand.

It is immaterial for our present inquiry that portions of the evidence given on behalf of the plaintiff were contradicted by Mitchell. The evidence was before the jury, and it was for them to accept or reject it as they thought right. They were entitled on the whole case to say that it had been proved to their satisfaction that a customer of the bank, who was a stockbroker, had to the knowledge of the bank become hopelessly insolvent; that his account with the bank was overdrawn beyond authorized limits; that it was in the interests and for the benefit of the bank and of the officials of the branch that the overdraft should be reduced; that no cheques could be lodged, but that a cash order was produced and handed over to the manager; that this represented what the bank manager had admitted, perhaps unwittingly, was bound to be the proceeds of client's stock. Even if, however, the jury did not wish to bind the bank manager by this admission, they were entitled at least to say that the proceeds of the cash order were as likely to belong to a client as to the stockbroker. Had Chadwick been perfectly solvent and no other

suspicious circumstances existed, there would have been no irregularity in his passing the money through his bank in the ordinary course of his business; but with full appreciation of his state of hopeless insolvency it was a legal fraud for him to take a course which had the effect of paying the bank with the plaintiff's money; and, further, in my clear opinion the bank, who, through their manager, either knew the full facts regarding the cash order, or, who, though put on inquiry, wilfully shut their eyes and declined to investigate those facts, were affected by and were in law privy to their customer's fraud. Accordingly, in finding as they did, the jury in my opinion acted both within the settled principles of law and in the best interests of commercial morality.

The bank were not acting in the ordinary course of business, or, in my opinion, in good faith; they were not, as in some of the cases where the transaction has been upheld, making a further advance in cash as against securities which were being lodged. They were simply using the knowledge which they possessed, in a vain endeavour to protect themselves regardless of the injury which they might be inflicting on others, and deliberately refraining from investigation when in my opinion it was incumbent upon them to make the fullest possible inquiry.

The verdict of the jury is approved of by the Lord Chief Justice. In his expression of approval I respectfully concur. In my opinion the defendants' application, whether it be viewed as one for judgment or for a new trial, fails, and must be dismissed with costs.

BEST, L.J. : The action was brought to recover the proceeds of the sale of one thousand pounds five per cent. war stock 1925-1947, which plaintiff instructed his stock-brokers, Messrs. Stewart & Company, of Londonderry, to sell for him. The members of that firm were William H. Chadwick and Robert C. Chadwick. The sale was effected on the 9th of November, 1926, and some days later the defendants' manager in Londonderry—Mr. Mitchell—obtained from the brokers a cash order for one thousand pounds, which represented the proceeds of the sale. He placed this sum to the credit of Stewart & Company's

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current banking account so as to reduce their overdraft below the permitted sum of two thousand pounds.

The question at issue between the parties was, whether at the time this money was lodged by the defendants' manager to the credit of the stockbrokers account, the defendants knew, or ought to have known, that the monies were in reality the property of the plaintiff. The jury found that the defendants ought to have known that the proceeds were plaintiff's property.

At the close of the plaintiff's case the learned Attorney General, who appeared for the defendants, asked the Lord Chief Justice to direct a verdict for his clients on grounds:—That there was no evidence proper to be submitted to the jury that the defendants knew that the plaintiff had not been paid for his stock; or knew that Chadwick had no authority from plaintiff to lodge the cash order to the credit of his own account.

At the close of defendants case the Attorney General repeated this requisition, which was refused, and the jury found as stated.

The argument of the Attorney General was that the principle enunciated by Lord Herschell in *Thomson v. Clydesdale Bank, Limited* (1) is applicable to this case. That principle is to be found at page 287 of the report, where his lordship says:—"It cannot, I think, be questioned that under ordinary circumstances a person, be he banker or other, who takes money from his debtor in discharge of a debt is not bound to inquire into the manner in which the person so paying the debt acquired the money with which he pays it. However that money may have been acquired by the person making the payment, the person taking that payment is entitled to retain it in discharge of the debt which is due to him. But it is said that in the present case the bankers took with notice that the sum which they received was a sum of money not belonging to their debtor personally, but which he held or had received for other persons, and that, having had this knowledge or notice, they are not entitled to retain it in discharge of Mr. Thomson's debt. My lords, I cannot assent to the proposition that even if a person re-

ceiving money knows that such money has been received by the person paying it to him on account of other persons, that of itself is sufficient to prevent the payment being a good payment and properly discharging the debt due to the person who receives the money."

The Attorney General says that the defendants case is governed by this principle, and that it would be impossible for business to be carried on by bankers if inquiries had to be made in each case as to the real ownership of moneys or securities lodged with them by their customers.

The Lord Chancellor goes on to say:—"No doubt if the person receiving the money has reason to believe that the payment is being made in fraud of a third person, and that the person making the payment is handing over in discharge of his debt money which he has no right to hand over, then the person taking such payment would not be entitled to retain the money, upon ordinary principles which I need not dwell upon."

It is upon this principle that Mr. Murphy bases his claim for relief, and we have to decide which of these principles is applicable.

If the defendants merely acted in the ordinary course of their business without fraud, knowledge, or notice, or anything to put them on inquiry as to the ownership of the cash order, then on the authority of *Hone v. Boyle* (1) they would be entitled to judgment. It, therefore, becomes necessary to examine the evidence which the jury had before them of the circumstances under which the lodgment was made.

Mr. Mitchell, for the defendants, stated that on the 17th November he had heard rumours of the insolvency of Stewart & Company, and by telephone he made an appointment to see Chadwick on the following day, and did see him in his (Chadwick's) office. What took place at this interview is, in my opinion, the vital factor in the case. The accounts given by Chadwick and by Mitchell differ most materially; but both agree in this that Mitchell wanted a lodgment to reduce Chadwick's overdraft below the permitted sum of two thousand pounds.

[His lordship dealt with Chadwick's account of the interview as set out ante p. 113.]

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The cash order was lodged in the bank on the 18th November and was immediately credited to Chadwick's account, thus reducing the overdraft well below the permitted limit.

Mitchell further said, "that we do not make inquiries about cash orders, and I had no knowledge that this money represented money of Mr. Cunningham's, but it appears on documents." Later, in answer to the Chief Justice he said that "on seeing the documents, contract, certificate, and transfer, as banker I would assume that they were the property of Chadwick as they came from his custody, even though he was a broker."

On the same day (18th November), Mitchell wrote to his directors a letter in which he says that "he regrets to advise them that this firm, Stewart & Company, has got into the position of not being able to pay their liabilities." He said further "that there are a great number of people interested, and that Chadwick estimates the shortage as upwards of £40,000." He mentioned that he had heard a rumour of it yesterday, and got into touch with Chadwick and had had a long interview with him that morning.

Chadwick's current account was by order of the directors closed on the 19th November.

Here then we have the two accounts which were placed before the jury of what took place in Chadwick's office at the interview between him and Mitchell.

It was for the jury to decide which account they would accept, and it is clear, on the whole that they regarded that given on behalf of the plaintiff as being more reliable than that given by Mitchell for the defendants.

In these circumstances can it be said that this money was obtained by the bank in the ordinary course of their business without fraud, knowledge, or notice, or anything to put them on inquiry? *Hone v. Boyle* (1). Is it, in the ordinary course of business, for a bank, knowing that its customer is hopelessly insolvent, to obtain through their manager a lodgment in the way in which this lodgment was obtained? If Chadwick's and Miss Beattie's evidence were accepted by the jury, as it appears to have been, then Mitchell must have known that this cash order belonged to the plaintiff; and in my opinion if they had so

found, their verdict could not have been touched. It is possible that out of regard for the bank manager the jury answered the question as they did. I think there was ample evidence to justify the finding of the jury, and in my opinion the verdict and judgment for the plaintiff ought to stand. The defendants application must be dismissed with costs.

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Solicitor for the appellants : *F. G. Dickson.*

Solicitors for the respondent : *Macaulay, O'Neill & Martin.*

J. McC.

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# ESTATE OF EDITH STRINGER AND OTHERS (1).

(N.I. 213.)

*Northern Ireland Land Act, 1925 (15 & 16 Geo. 5, cap. 34)—  
Allocation of funds in court—Owners' costs of sale—Superior  
interest—Priority of claims.*

The estate of E.S. vested in the Land Purchase Commission by virtue of the Northern Ireland Land Act, 1925. The purchase money was insufficient to meet the owners' costs of sale and the redemption price of a superior interest.

*Held* (by Megaw K.C., Judicial Commissioner) that in the case of an estate sold under the Northern Ireland Land Act, 1925, the owners' costs must first be paid, and that the costs of making title to any superior interest take priority to the redemption price thereof.

By operation of the Northern Ireland Land Act, 1925, the estate of Edith Stringer and others containing 11a. 0r. 30p let at a rent of £5 12s 0d vested in the Land Purchase Commission. The purchase money amounted in cash value to about £95. The first item in the allocation schedule was the owners' taxed costs amounting to £71 18s 10d. The next item related to a head rent of £1 10s 10½d affecting the lands which by consent was to be redeemed at 20 years' purchase, the redemption price amounting to £30 17s 6d, the first two items more than exhausting the funds in court.

*Monroe K.C.* and *McCorry* for the owners :—

The owners' costs are a prior claim against the funds in court *Estate of Constable* (2). The Act of 1925 is a compulsory Act and it is necessary for the sale to be carried out by the owner through a solicitor. The work is done on behalf of everyone interested in the estate, and the owner of a superior interest also benefits by it. Under the Land Judges practice where the costs were by statute in the discretion of the court even an owner petitioner's costs were in a proper case given priority over all claims.

(1) In the Court of the Land Purchase Commission before Megaw, K.C., Judicial Commissioner. (2) 1 N.I.J.R. 20.

*Hume* for the owner of the superior interest:—

The owner of a superior interest should not be required to pay costs incurred by the vendors in making title and selling their own land. The question must be decided upon the equities existing between the parties and as the owner of a superior interest is in a position to destroy the tenant's interest he has a prior equity. The effect of the 1925 Act is that both the estate of the vendor and the estate of the owner of the superior interest must be bought out and the loss should fall upon the person upon whom it would have fallen under the previous Land Acts.

*Cur. adv. vult.*

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The Judicial Commissioner, giving judgment, said:—The purchase money of this “estate,” amounting in cash value to something about £95, has now come to credit and it is my duty as Judicial Commissioner to apply it in proper priorities. In the Allocation Schedule the first item I find is owners' costs. This item is a taxed bill of costs amounting to £71 18s 10d.

When the case first came before me I felt that some investigation was necessary. Did the case present any unusual complexities, or was it normal that in a case where the purchase money was less than £100 the costs of the owner should absorb three-fourths of the total? The next item in the Allocation Schedule was no less disconcerting. It appeared that there was a superior interest in the shape of a head rent of £1 10s 10½d affecting the lands—a rent which under the Act had to be redeemed. There was a contest before me as to the redemption price. The solicitors for the owner had entered into a correspondence with the solicitors for the owner of the head rent. In this correspondence there was a vigorous debate as to whether 20 or 23 years' purchase of the rent should be the redemption price. It was seriously contended before me that this rent being for a small sum should fetch a higher proportional price than larger well secured rents. No evidence was given as to the market price of similarly secured rents, and I then felt coerced to give 20 years' purchase being the amount that the owner had offered and his counsel in court put forward as a proper price. At 20 years' pur-

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chase the redemption price amounted to £30 17s 6d, so that these two first items in the Schedule more than exhausted the cash available.

The costs however of the owner of the £1 10s 10½d head rent in respect of deducing title to the head rent were still to be provided for and I was asked to retain £25 to cover these. It became clear that apart from the interests of the owner there was a conflict between the owner of the estate and the owner of the rent as to priorities, and accordingly the matter stood over for argument.

In course of the argument counsel for the owners contended that the solicitors for the owners did nothing and charged for nothing that was not necessary under the Rules. I asked for the bill of costs, a copy of which has since been sent to me. As I have said it is a taxed bill. It includes no item concerned with the statutory obligations imposed upon persons entitled to the rents and profits of land under Section 17 of the Northern Ireland Land Act, 1925. The amount for disbursements allowed in the bill was £9 6s 4d (including £2 2s 0d for counsel's fee and £3 2s 10d or 15 dollars paid to American attorneys for sending a certificate of death and copy of a will). There were admittedly no special requirements in regard to title—and the only special feature was some correspondence with America, unless the controversy in regard to the superior interest can be regarded as abnormal, yet the profit costs involved in the transfer of this little bit of land amount to a total of £62 12s 6d. These facts and figures are, to say the least of it, disconcerting.

No useful purpose would be served by commenting in my decision on the anomalies and startling effects disclosed in the ruling of this schedule. Suffice it to say that they have not been lost sight of, and though it is cold comfort to the owners in the present case the procedure will probably be modified, so as to prevent the recurrence of such a situation as far as possible.

The question for the court to determine in this case is one of priorities, and I must deal with it at present on the basis that the taxed bill is proper in every respect as being costs properly incurred by the owners under the 1925 Act. Naturally when all existing rules and formalities

that are incident to the compulsory transfer of lands are observed—rules and formalities that may be necessary in small properties though they have been framed for very different conditions—the costs, even when the machinery of the Land Purchase Commission is supplied without expense, must necessarily be more than normal. It is only fair to the taxing officer to make it absolutely clear that there is not the slightest suggestion that the taxation was in any respect improper. He allowed no item that did not seem to be properly included in the schedule of fees, but as I have stated the taxation was *ex parte*. Evidently the examiner had no reason to suspect that the estate was insolvent and did not direct any notice to be served on the owner of the superior interest under Order XXI, rule 2, as he had power to do and should, and would have done had he thought that any one was interested in the taxation other than the owners of the estate.

There is one fundamental difference in the provisions affecting land purchase in the 1925 Act from those in the earlier Land Purchase Acts. Except in special cases the Land Purchase Acts prior to 1925 contemplated a voluntary sale. The sale in the earlier Acts was effected by a voluntary agreement between owner and tenant. From 1896 this had the result of bringing about the compulsory acquisition of superior interests. Logically it followed that when persons set machinery in motion that would compel others to transfer their property the persons under compulsion would be indemnified against costs by the persons who brought compulsion into operation. The 1925 Act is based on different considerations. The Act itself declares that tenanted land shall vest in the Land Purchase Commission. For the purpose of ascertaining what is tenanted land it imposes definite duties and obligations upon owners of land—an entirely new departure, but necessary for carrying into effect the object of the Act, *viz.*, the vesting of the fee of agricultural lands in the occupying tenants. Section 17 which defines and imposes these duties requires close scrutiny.

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[The Judicial Commissioner read the section, ss. (1), (6) and (8).]

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Sub-section 8 would appear to be ineffective in cases where the Commission may require persons under sub-section 1 to furnish particulars and such persons on investigation are found not to be owners of tenanted land within the Act. While such persons must furnish the statutory particulars, no provision has been made for their costs of doing so unless where a sale results and purchase money is advanced under the Acts. It seems to me, however, that Section 17 (8) makes the remuneration of such land agent, solicitor, etc., a first charge on the purchase money, and it is reasonable to infer that the intention of the legislature was that the costs incurred by the persons primarily called upon to discharge the duties under section 17, sub-section 1, are not in a less favoured position than if the alternative set out in sub-section 8 has been adopted.

The next clause that deals with the enforcement of the duties so imposed is sec. 29, sub-sec. 1.

[The Judicial Commissioner read this section.]

The words of sub-section 2 of this section, especially considering the reference to the bonus which is not included in Section 17 (8) seem to reinforce the conclusion that the costs for which these are the alternative are a charge on the purchase money, and, by way of penalty are also charged on the bonus and interest payable to the owner.

We have then section 33, which provides that the power of the Commission to make rules shall be extended so as to include a power to make rules for carrying the Act into effect.

Under this power we have the Provisional Rules and Orders of 29th May, 1925. Order II, Rule 1, provides:—  
“ Except where otherwise provided in these rules and so far as not inconsistent therewith all existing rules and Orders under the Land Purchase Acts as are applicable to Northern Ireland shall apply to proceedings under the Act.”

Order VIII gives elaborate directions as to the information, maps and particulars that must be furnished by persons called upon to do so by section 17 of the Act.

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Order XVI imposes on owners of lands an obligation to lodge an originating affidavit as regards such lands, while Order XVII deals with the costs incurred in the course of proceedings under the Act and provides that the certificate of the solicitor of the Commission as to such costs shall be final unless varied by the Judicial Commissioner. Appended to the rules and orders is a schedule of fees by which it is provided "that the existing schedule of fees relating to costs incurred in the course of proceedings under the Land Purchase Acts shall so far as same are applicable, apply to proceedings under the Act with the addition of the following supplemental schedule."

This, I think, refers to the amount of the fees only and is not concerned with their incidence or priorities. There follows a paragraph, "Furnishing of particulars where no fixed amount or scale is payable under section 17 (8) of the Act." It is a fair inference that this alternative amount allowed for costs is payable in the same way and in the same priority as where an amount is payable under section 17 (8).

Summing up the whole question it would appear that the work has got to be done under the statute. The Commission have required it. The Commission have power to make rules to carry into effect their duties under the Act and have done so. The owners of the lands and their solicitors have carried out their statutory duties and must be remunerated. It is unnecessary to decide anything as to the priority of costs as between the respective owners of the lands and of the superior interest seeing that the funds in court will be sufficient to cover both sets of costs. The costs of the owner of the head rent were incurred in discharging duties under the Act, and in my opinion they take priority to the redemption price of the head rent.

Were I to arrive at any other conclusion the result would be that not only would the owners of lands in a case like the present get nothing for the lands compul-

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sorily taken, but at the close of the proceedings would be under a liability to their solicitors by reason of carrying out by the aid of solicitors the duties imposed on them willy nilly by the Commission. I decline so to decide unless compelled by clear and unambiguous language of the Acts which I am judically administering.

One point remains. The owners' costs have been taxed, but so far as the owner of the head rent is concerned the taxation has been *ex parte*. I must give liberty to the parties interested in the head rent, if so advised, to re-open the taxation and to dispute any items they may consider improper or excessive.

Solicitors for the owners: *Daniel O'Rorke & Sons*.

Solicitors for the owner of the superior interest:  
*Hunter, Moore & Boyle*.

J. D. C.

IN THE MATTER OF THE LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891, AND OF JOSEPH STEVENSON, Deceased, a registered owner of land. Land Judge.  
1928.  
March 2.  
Folio 641. Co. Armagh.

*Land Registry—Consolidation of holdings—Order of Ministry of Finance for consolidation—Personal representative of owner—Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict., c. 66), s. 84 (3); Northern Ireland Land Act, 1925 (15 & 16 Geo. 5, c. 34), s. 30 (3).*

J. S., a registered owner of lands, died intestate, and administration was granted to H. R. S. (the applicant). The deceased died possessed of two registered holdings, folios 641 and 642 Co. Armagh. In 1926 the applicant agreed to sell a portion of 641, marked B, to J. M'C. and a portion of 642, marked B, to S. M. As these proposed sales involved a sub-division of each holding, the applicant applied to the Ministry of Finance for permission to sub-divide. Consent was given by the Ministry on the condition that plot "A" of 642 should be consolidated with plot "A" of 641. The Ministry made two orders for apportionment and consolidation, one in respect of each holding. The proprietor named in the orders was the applicant H. R. S., as personal representative of the deceased. In order to meet objections made by the Land Registry the Ministry of Finance cancelled the orders already made and made two new orders, in which the registered proprietor was described as J. S., deceased, in order that the personal representative might be able to carry out the necessary requirements. The Land Registry refused to accept these orders unless the consolidation clauses were omitted, on the ground that having regard to *In re Fitzmaurice's Estate* ([1918] 1 I.R. 33) the consolidations effected were not within the terms of sections 30 (3) of the Northern Ireland Land Act, 1925 (15 & 16 Geo. 5, c. 34).

The applicant appealed from the order made by the Land Registry.

*Held* by Wilson J. that the Ministry of Finance had power to make the order for consolidation on the consent of the personal representatives of the deceased owner under section 84 (3) of the Local Registration of Title (Ireland) Act, 1891. The order of the Registrar of the Land Registry was discharged, and it was ordered that the consolidation contained in the order made by the Ministry be entered on the Register.

APPEAL to the Land Judge from an order made by the Registrar of the Land Registry, directing that a consolidation of holdings under an order of the Ministry of Finance of 18th November, 1927, be not carried out on the Register, and that the registration of John M'Cann, a purchaser of portion, be postponed until the order be amended by the deletion from it of the consolidation clause. Joseph Stevenson died on 18th January, 1919, intestate, and on 22nd November, 1920, administration

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was granted to Herbert Robert Stevenson (the applicant). The deceased died possessed of two registered holdings, folios 641 and 642, Co. Armagh. In 1926, the applicant agreed to sell the portion of 641 which was marked " B " on the map to John M'Cann, and the portion marked B on 642 to Samuel Metcalfe. As these proposed sales involved a sub-division of each holding the applicant applied to the Ministry of Finance for permission to sub-divide. These applications were at the request of the Ministry reported upon by an inspector of the Land Purchase Commission, N.I., and Mr. Commissioner Wilson of that department advised upon the sub-division, and that a condition of the consent should be the consolidation of plot " A " of 642 with plot " A " of 641. The Ministry notified the applicant's solicitors, giving the figures of apportionment of area and annuity on each holding, and intimating the condition of consolidation, and subsequently made two orders for apportionment and consolidation, one in respect of each holding on these terms. These orders, Nos. 702 and 724, were duly lodged with the Land Registry. On 21st October, 1927, a letter was received by the Ministry of Finance from the Land Registry, in which it was stated that registration would be held over until either the consolidation was withdrawn, or Herbert R. Stevenson was registered as owner in fee simple of the consolidated holdings. Up to this date the proprietor named in the Ministry's orders was the applicant Herbert Robert Stevenson, as personal representative of the deceased. In order to meet the objections made by the Land Registry the Ministry's orders already made were cancelled and two new orders, Nos. 748 and 749, were made, in which the registered proprietor was described as Joseph Stevenson, deceased, in order that the personal representatives might be able to carry out the necessary requirements. Further correspondence took place which finally resulted in the refusal of the Land Registry to accept these orders unless the consolidation clauses were omitted, on the ground that the consolidations effected by these orders were not in accordance with the terms of section 30 (3) of the Northern Ireland Land Act, 1925, which required the consent of the registered owner to such consolidations.

*A. B. Babington K.C.* (Attorney-General) and *Land Judge 1928.*  
*Dougherty* for the applicant :—

It is provided by section 30 (3) of the Northern Ireland Land Act, 1925, that when sub-division is authorized any portion of the holding may, if the Ministry of Finance so direct, with the consent of the registered proprietor of the holding, be deemed to be consolidated with any other holding of which he is the registered proprietor. The Registrar objected that the person who gave consent was not the registered proprietor.

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(WILSON J. : Before this section was passed could not the property have been sub-divided with the consent of the owner? Is it suggested that his personal representative has not this right?).

*Babington K.C.* : Section 84 (3) of the Local Registration of Title (Ireland) Act, 1891, provides that on the death either of a sole registered full owner or of the survivor of several registered full owners of any such land not being registered as tenants in common, the personal representatives of the sole owner or survivor shall alone be recognised by the registering authority as having any right in respect of the land, and shall have the same powers of dealing with the land, and any registered dispositions by them shall have the same effect, as if they were the registered owners of the land. Section 30 (3) of the Northern Ireland Land Act, 1925, should be read in conjunction with section 84 (3) of the Local Registration of Title (Ireland) Act, 1891. The Ministry of Finance had full power to make this order on the consent of the personal representatives of the deceased owner, because section 84 (3) of the Local Registration of Title (Ireland) Act, 1891, gives full power to the personal representatives of the deceased to deal with the land.

[They referred to *In re Fitzmaurice's Estate* (1).]

There was no appearance for any other party.

WILSON J. (sitting as Land Judge) ordered that the order of the Registrar be discharged and that the consolidation contained in apportionment order No. 748 made by the Ministry on 18th November, 1924, be carried out on the Register.

Solicitors for the applicant : *Watson & Neill.*

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## IN THE GOODS OF MARTIN (1)

*Execution of will—Position of testator's signature—"Foot or end"—The Wills Act, 1837 (1 Vict., c. 26), s. 9—The Wills Amendment Act, 1852 (15 & 16 Vict., c. 24) s. 1—Disposition following signature.*

W.M.'s will was written out by S., a witness, on the instructions and in the presence of W.M. on a printed form consisting of a large sheet of paper folded vertically so as to form four pages. The first page, numbered "1" in writing, contained the appointment of executors and certain devises and bequests. The letters "P.T.O." were written at the bottom right hand corner of this page. Page 2, which was also so numbered, contained further bequests, followed by the testator's signature and the attestation clause (in print) and in the bottom right hand corner there again were written the letters "P.T.O." There was not sufficient room on page 2 for a residuary clause and directions as to payment in full of charitable legacies and probably for this reason they were written on the upper half of the next page numbered in writing "page 3."

*Held*, by the Court of Appeal (Andrews and Best, L.JJ.), varying the order of Moore, L.C.J., who had admitted the entire document to probate, that the first and second pages of the document should be admitted, but that the writing on the third page should be excluded from the grant of probate as that portion of the will followed the signature. In the Goods of French (23 L.R. Ir. 433) dissented from.

APPEAL on behalf of the next-of-kin of William Martin deceased, from an order of Moore, L.C.J., giving liberty to Hugh M. Jackson and William J. Anderson, as executors, to apply for a grant of probate of the will of William Martin deceased, dated the 9th day of May, 1927, as contained on pages 1, 2 and 3 thereof.

The will was prepared on a printed form and was partly in print and partly in the handwriting of F. Sloan, one of the attesting witnesses, who wrote it under the instructions and in the presence of the testator. The will commenced with the words "This is the last will and testament of me, William Martin," on the first page. This page also contained a revocation clause, the appointment of executors and certain devises and bequests and the written letters "P.T.O." at the bottom right hand corner.

Pages 2 and 3 read as follows, the words in Roman type

(1) In the Court of Appeal before Andrews, L.J. and Best, L.J.

representing printed words and the words in italics representing written words.

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On page 2 are the words :—

On page 3 are the words :—

2.

Page 3.

*To my brother Robert Martin, Willowfield St., Belfast, the sum of sixty pounds (£60).*

*To Eveleen Freeland, Belfast, the sum of twenty pounds (£20).*

*To William John Jackson, the aforesaid executor the sum of eight pounds (£8).*

*To William John Anderson, the aforesaid executor the sum of eight pounds (£8).*

*My watch and chain are to be handed to my brother John Martin, 39 McClure St., Belfast.*

*It is also my wish and desire that William John Jackson of 30 Camden St., Belfast, one of my executors as aforementioned, be elected a life-governor of the Royal Victoria Hospital, Belfast, by my gift of fifty pounds (£50), this to come out of the residue of my estate.*

Signature of Testator, Wm. Martin  
SIGNED by the said WILLIAM MARTIN, the Testator as and for his last Will and Testament, in the presence of us, both present at the same time, who at his request, in his sight and presence, and in the sight and presence of each other, have hereunto subscribed our names as Witnesses.

Name, FRANCIS SLOAN,  
Address, 7 Vernon Street, Belfast,  
Co. Antrim.

Name, SAMUEL S. SLOAN,  
Address, 7 Vernon Street, Belfast,  
Co. Antrim.

P.T.O.

Warnock, for the next-of-kin :—

The testator's signature cannot give effect to a disposition which is underneath or which follows it. I rely on section 1 of Lord St. Leonard's Act (15 & 16 Vict., c. 24). *In the Goods of Ffrench* (1) and *In the Goods of Gilbert* (2) are not good law.

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[He also referred to *In the Goods of Dallow* (1), *In the Goods of White* (2), *In the Goods of Watkins* (3), *Royle v. Harris* (4), *In the Goods of Evans* (5).]

Miller for the trustees of the Royal Victoria Hospital, legatees under the will:—

Where the court is of the opinion that the whole will has been written out and approved of by the testator before he came to sign it and every portion was printed or written before he did so, an irregularity in the position of the signature will not be fatal provided that the writing does not follow the signature. I rely on *In the Goods of Ffrench* (6). The matter on page 3 is on the same surface of paper as that on page 2 and it is in the same position as if it had been on the margin of page 2.

[He also referred to *In the Goods of Jones* (7), *In the Goods of Coombs* (8), *In the Goods of Ainsworth* (9), *In the Goods of Wotton* (10), *In the Goods of Kimpton* (11), *In the Goods of Archer* (12), *In the Goods of Gilbert* (13).]

Fox for the executors.

ANDREWS, L.J., having stated the facts:—

The net question for our determination is whether the contents of page 3 should be included in the grant of probate. I should say at the outset that the case was not argued before us as one to which the doctrine of incorporation applies; for it is recognised that the reference on page 2 to the testator's gift of £50 to the Royal Victoria Hospital, to come out of the residue of his estate, is not sufficient for that purpose. *In the Goods of Watkins* (3) and *In the Goods of Dallow* (1) clearly establish that before that doctrine can be applied, it is not only necessary that the testator should refer in the executed paper to some other paper then actually in existence, but further

(1) L.R. 1 P. & D. 189

(2) [1896] 1 I.R. 269

(3) L.R. 1 P. & D. 19

(4) [1895] P. 163

(5) 128 L.T. 669

(6) 23 L.R. Ir. 433

(7) 34 L.J.R. 41

(8) I.R. 1 P. & D. 302

(9) L.R. 2 P. & D. 151

(10) L.R. 3 P. & D. 159

(11) 1 Sw. & Tr. 427

(12) L.R. 2 P. & D. 252

(13) 78 L.T. 762

it must appear that the paper in question is beyond all doubt the paper referred to. Parol evidence is not admissible for this purpose. The documents must themselves prove their own identification.

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By Section 9 of the Wills Act, 1837, it was provided (inter alia) that no will should be valid unless it should be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction. Cases soon arose in which, though the testamentary intention was undoubted, it was found necessary to refuse probate on the ground that the testator's signature was not placed literally at the foot or end of the will. Such cases included those in which the signature was on a different page, or in the margin, or after a blank space, or in the testimonium, or in or after the attestation clause. To overcome what was regarded as a manifest injustice, the law was amended by Section 1 of Lord St. Leonard's Act (15 Vict., c. 54) by which it was enacted that every will should, so far only as regards the position of the signature of the testator, . . . "be deemed to be valid

if the signature shall be so placed at or after or following or under or beside or opposite to the end of the will that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will." Then follows an express provision that no will should be affected by the circumstances upon which the courts had acted in holding against the wills in the cases under the Act of 1837, to which I have referred, the enumeration of such circumstances being stated not to restrict the generality of the enactment. The section concludes with the important proviso that no signature under the Act of 1837 or that Act should be operative to give effect to any disposition or direction which is underneath or which follows it.

Considering the matter in the first instance on the wording of the section and apart from all authority, it seems to me that it is impossible to hold that the contents of page 3 should be included in the probate unless pages 2 and 3 can be treated as in reality one page. If pages 2 and 3 are different pages, I feel driven to the irresistible conclusion that the signature just above the middle of page 2 is neither "at, nor after, nor following, nor under, nor beside, nor opposite" to what is written at the top of page 3.

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Equally clearly it would be impossible to say that the dispositions on page 3 did not follow the signature on page 2. I gather that the Lord Chief Justice must have shared this view; for we are told that the ground on which he upheld these dispositions and admitted them to probate was that, as he said, if the paper on which the will was written were folded across instead of down the middle of pages 2 and 3, then, not only was the signature "under" all that was written on so-called page 3, but it also "followed" it. The Lord Chief Justice, therefore, treated pages 2 and 3 as really one page, and made what seems to me, if I may respectfully say so, to be an artificial division across the middle of them. I freely admit that such a decision might be more consonant with the justice and merits of the present case; but I am unable to adopt the view taken by the learned Lord Chief Justice; for I cannot do for the testator something which would in my opinion be absolutely at variance with what he or his draftsman did for himself. It seems to me that in at least three distinct ways he treated pages 2 and 3 as separate pages. In the first place, he wrote upon them separately instead of, as he might have done, in continuous lines across them; secondly, at the top of them appear the figures and word "2" and "page 3" respectively; and, finally, at the bottom of page 2 appear the letters "P.T.O.," which obviously could only have reference to page 3, just as the same letters at the foot of page 1 obviously refer to page 2. Thus, it seems to me that a key is provided by the testator himself as to the due and proper sequence of the different parts of his will, and this coincides with what is obviously the natural sequence. Pages 2 and 3 must, therefore, in my opinion, be regarded as separate pages; and on this assumption the contents of page 3 follow the signature of the testator, and must, therefore, be excluded from the probate.

It only remains to consider whether I am prevented by binding authority from giving effect to this conclusion. The authorities appear to me to establish clearly that the will is not invalidated by the fact that an intervening blank space is left between the end of the will and the testator's signature, or even by the fact that it is on a page or side

of a sheet which contains no disposing part of the will, provided it is so placed as, in the words of the statute, "to be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will." It is immaterial in such a case that the last disposing page of the will had adequate space in which the testator could have written his name. It has also been held that a testator had duly complied with the provisions of the statute where, from want of space, he wrote his name crossways on the right hand side of the paper opposite to the place for the names of the witnesses *In the Goods of Jones* (1); and also where he wrote it crossways on the second page of a sheet of foolscap paper, the first and third pages of which were filled by the will *In the Goods of Coombs* (2); for in each of these cases the testator's intention was apparent on the face of the will. It is immaterial that the testator's signature occupies a position on the paper after the names of the witnesses. The due sequence of events in the execution of a will is determined by the criterion of time and not of space. In all such cases and in many others which could be cited in which the vagaries of testators have been brought before the court, it has been found possible to give full effect to what was a genuine act of execution. But, however praiseworthy this may be, one must not forget the sound advice of Lord Penzance in *Sweetland v. Sweetland* (3), that "it does not become the court in a laudable anxiety to give effect to the document to twist or distort the plain meaning of the statute by ingenious construction, and virtually break the law to amend the testator's blunder."

It was not intended by the legislature that all the honest blunders of testators should be overcome by the Act of 1852. In certain respects it relaxed the rigour of the old law, but it imposed conditions, the due performance of which is essential to valid execution. One of these is that contained in the proviso, namely, that the signature shall not be operative to give effect to any disposition or direction which is underneath or which follows it. The only exception, and it is indeed merely an apparent, not a real, one, is in those cases in which words written physically

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(1) 4 Sw. & Tr. 1

(2) L.R., 1 P. & D. 302

(3) 4 Sw. & Tr. 6

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beneath or after the signature have been deemed to be above it by reason of the will containing clear internal evidence not only that such was the testator's intention, but also that the words were written before execution. Asterisks and other signs of interpolation or interlineation have been judicially recognised as evidence of the testator's intention. The court must, however, in all such cases be satisfied that, though the signature is strictly speaking and physically above the dispositive part of the will, in truth and reality it follows it. This principle has been applied in certain cases such as *In the Goods of Wotton* (1), so as to permit the unnumbered pages of a lithographed will to be read in an unnatural order, page 2, which contained the ordinary commencement of a will with the name and description of the testatrix, and page 3 which followed being treated as pages 1 and 2, whilst that which would naturally be regarded as page 1 and which contained the appointment of executor, testimonium, and attestation clauses and requisite signatures, was treated as page 3. Such cases are not, however, really exceptions to the rule; rather do they recognise it; and they merely afford illustrations of how the courts have, where not only permitted, but virtually directed by the testator to do so, given a sequence to the various parts of a will different from that which they physically possess. In *Royle v. Harris* (2), Sir Francis Jeune explains the decision in *Wotton's case* by saying that, looking at the whole frame of the document, the inference is irresistible that pages two and three were written before the first page and intended to be the commencement of the will. In this respect, he points out, it differed from the facts in the case then before him, where a lithographed form of will duly filled in, executed on page one and containing bequests to "my sisters and friends" was followed on pages two and three by a list of bequests to persons, some of whom were the sisters and others friends of the testatrix.

In my opinion the case which most closely resembles the present is *Goods of Evans* (3), where Hill, J., decided that words which in point of place follow the signature of the testator, and which are neither incorporated in the will

(1) L.R. 3, P. & D. 159

(2) [1895] P. 163

(3) 128 L.T. 669

by any reference appearing above his signature, nor shown by context to have really preceded the signature, cannot be admitted to probate, though shown by the evidence of attesting witnesses to have been written by the testator with testamentary intention before he in fact affixed his signature. In that case a holograph will on the two outer pages of a folded sheet of notepaper commenced at the top right hand page, and was signed by the testator at the foot of the left hand page. Following his signature were the words "My last will and testament. P.T.O."; and on the left inside page was a reference to his executors and beneath them the words "Witness to signature," followed by the signatures and addresses of two attesting witnesses. It is important to note, as directly applicable to the present case, that in the opinion of Hill J. there could not be incorporation by reference as the letters "P.T.O." were below the testator's signature. The contents of page 3 were, therefore, excluded from the grant. In my opinion, this case was rightly decided and I follow it.

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In conclusion I should say that we were pressed by counsel for the Royal Victoria Hospital with the cases of *Goods of Gilbert* (1) and *Goods of Ffrench* (2). Neither case commends itself to my acceptance. The decision in the first case admitted to probate not only page 1, a duly filled in and executed printed form of will, but also pages 2, 3 and 4, purely, so far as the report shows, on its being established in evidence that they were written before the signature. The case was heard on an *ex parte* application and the decision cannot, in my opinion, be supported on the ground stated. In *Goods of Ffrench* (2), the testatrix wrote her will on a sheet of notepaper, one part on the first page, and another part on the fourth page. It was duly executed by her at the foot or end of the first page and there attested. It was proved that both parts were read to her as her will before she signed it with her mark, and thereupon Warren J. admitted the whole document to probate. The case, which was heard on a motion, does not appear to have been fully argued, and is but briefly reported. The only ground relied upon by Warren J. in

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reversing the decision of the Registrar is that it was all read to the testatrix, and that she approved of it when she made her mark. In so holding, it appears to me that the learned judge substituted a test of knowledge and approval of the contents of a will for compliance with the statutory conditions to which I have referred. Moreover, the decision is at variance with accepted authority which I have cited, and in my opinion it cannot be supported.

On the authority of *Royle v. Harris* (1), we are not obliged to condemn the whole will, but are entitled to treat pages 1 and 2 as constituting a properly executed will. We, accordingly, pronounce in favour of the will as contained in those two pages; and, having regard to the special circumstances of the case, we shall allow all parties their costs out of the estate.

BEST, L.J. : The first page of the script has the figure " 1 " written at the top; the second page has the figure " 2 " written likewise, and the third page has the words " Page 3 " written at the top left hand corner thereof. At the bottom right hand corner of each of the pages 1 and 2 the letters " P.T.O." are inserted in writing. The testator's signature, and the signatures of the attesting witnesses, are on page 2. It was proved by an affidavit of one of the attesting witnesses that the contents of the will, including the clause dealing with the residue, written on page 3, were written by him; that he read over the contents to the testator, who appeared to understand them fully and to approve of them, and that thereupon the will was duly executed. The writing on page 2 extended almost but not quite as far down the page as the printed words " Signature of testator," and in the vacant space thus left there was not sufficient room for the residuary clause which was accordingly placed at the top of page 3. Mr. Warnock, for one of the next-of-kin of the deceased who had been appointed to represent the class of next of kin, cited three cases as authorities for the proposition that the principle of the incorporation of the contents of page 3 by reference is not applicable, and this was not disputed by Mr. Miller, who appeared for the trustees of the Royal Victoria Hospital. The sole question before us

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is, whether testator's signature is at the foot or end of the will, as required by section 9 of the Wills Act, 1837 (1 Vict., c. 26), and section 1 of the Wills Amendment Act, 1852 (15 & 16 Vict., c. 24). Section 9 of the Wills Act, 1 Vict. c. 26, provides that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned, that is to say: "It shall be signed at the foot or end thereof by the testator, etc." It has been well said that a mine of litigation was hidden away in this provision, and the difficulties that arose as to the meaning and effect of the words "foot" or "end" were so numerous that it became necessary to pass a statute amending the Wills Act, which amending statute is commonly known as Lord St. Leonard's Act. Section 1 of this Act provides that so far only as regards the position of the signature of the testator, or of the person signing for him, the will shall be deemed to be valid within the Wills Act if the signature shall be so placed at or after or following or under or beside or opposite to the end of the will that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and after an enumeration of the circumstances which gave rise to the difficulties I have referred to the section goes on to provide that the enumeration of the above circumstances shall not restrict the generality of the above enactment. The section further provides that no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it.

The writing on the third page did not extend as far down that page as did the writing on page 2, so that if a line were drawn across pages 2 and 3, parallel to the top of those pages, and immediately above testator's signature, the writing on page 3 would be an appreciable distance above that line. The Lord Chief Justice did not deliver a written judgment, but we were informed by counsel that he drew in imagination some such line, as is here indicated, by folding the paper across the middle of pages 2 and 3 instead of from top to bottom, and that he was of opinion that the execution of the will was at the foot or end thereof within the true meaning of the sections just

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referred to. Any one reading the testamentary document, having proceeded to the end of the first page thereof, would find the letters "P.T.O." in the place already mentioned, and the meaning of these letters is that the reader is invited to turn over the page and to continue his reading on page 2. Similarly, having read the contents of page 2, which page concludes with the address of the second attesting witness to testator's signature, the reader is again invited by the use of the letters "P.T.O." to proceed to the consideration of the next page of the script, i.e., page 3 thereof. The signature of the testator has already been passed over by the reader, and it appears clear to me that the contents of page 3 are so placed that the case comes directly within the proviso already mentioned: "No signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it." I express no opinion on the question whether the residuary clause is underneath the signature, but I am clearly of opinion that it follows the signature. There is not, on the face of the document, any mark or indication from which it could be inferred that the intention of testator was to interpolate on page 2 immediately above his signature the contents of page 3. I think on principle, therefore, apart from authority, that the residuary clause must be rejected. If authority were required to support this conclusion, it would be found in the case of *In re Evans* (1), relied upon by Mr. Warnock. There the question was whether there was in the will an appointment of executors. The will was written on the two outer pages of a folded sheet of notepaper, commencing at the top of the right hand page, and signed by the testator at the foot of the left hand page. Then, following his signature, were the words, "my last will and testament. P.T.O.," and on the left hand inside page the words "My executors remain the same. My wife Mary and my brothers Joseph Osmund and Walter Henry Evans." And beneath them the words: "witness to signature," followed by the signatures and addresses of two attesting witnesses. It appeared from a joint affidavit of the attesting witnesses in that case that the clause appointing executors had been

written by the testator before he signed the will, and that he subsequently signed it in the witnesses' presence, and they then signed it in his presence and in the presence of each other. Mr. Justice Hill giving judgment says: The grant of probate depends on whether there is in the will an appointment of executors. I cannot find one. I am bound by the words of the proviso to the Act of 1852 that "No signature . . . shall be operative to give effect to any disposition or direction which is underneath or which follows it." Now this will clearly begins on the page headed with an address, and is carried by context to the top of the left-hand outside page. At the foot of that page appear the date and the signature of the testator, and below them the letters "P.T.O.," and then, on an inside page, the appointment of executors and the signatures of the attesting witnesses. The appointment of executors is not underneath, but does, in my opinion, follow the signature of the testator. Some of the cases relied on are cases of incorporation by reference, which is lacking here, as the letters P.T.O. are below the testator's signature. Further on, he says: "In this case I cannot find that the clause appointing executors does not follow the testator's signature, and I must therefore exclude it from the will and refuse probate."

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Mr. Miller relied principally on the case of *In the Goods of Ffrench* (1). In that case the testatrix wrote her will on a sheet of notepaper, one part on the first page, and another part on the fourth page. It was duly executed by her at the foot or end of the first page and there attested. It was proved that both parts were read to her as her will before she signed it with her mark; that she was a woman of some education and intelligence, and signed with a mark from physical debility. The court admitted the whole document to probate. Judge Warren says in his judgment that "It has been proved that the will was duly executed. I am satisfied from the evidence of Doctor Harrison, who read the will to the testatrix, that the testatrix approved of both sides of the paper when she made her mark." It appears that the Registrar in that case decided against the admission to probate of the fourth page on the ground that that page followed testator's signature. In this I

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think he was right, and the learned judge was wrong, and I decline to follow the decision.

Mr. Miller, in his very ingenious argument for the hospital, asks us to look at the will. He says that the matter on page 3 is in the same position as if it had been on the margin of page 2. But there is nothing on the face of the document, such as asterisks, or a line with a loop surrounding the residuary clause, or any other device which would indicate that that clause is to be interpolated immediately above the signature of the testator. He further says that if the paper were folded in the way in which as we have been informed it was folded by the Lord Chief Justice, the residuary clause would appear above the testator's signature, and that the end of the residuary clause is the true end of the will. There would be a great deal to be said in favour of this contention were it not for the letters " P.T.O." at the bottom of page 2, and the words " Page 3 " at the top left hand corner of that page. Reading this document as one would read the pages of a book page by page, there is no doubt in my mind that the residuary clause follows the signature of the testator. Mr. Miller urges that where the court is clearly of opinion that the whole contents of a testamentary disposition have been written out before the testator signed his name, and where every portion has been approved of by him, irregularity in the position of the signature will not be fatal to the part impeached, provided the writing does not follow the signature; but, in this case, for the reasons stated, I am of opinion that the residuary clause does follow the signature.

I agree that the first and second pages alone of the document shall be admitted to probate, and that all parties shall be allowed their costs out of the estate.

Solicitors for the next-of-kin : *George M'Cracken & Co.*

Solicitors for the trustees of the Royal Victoria Hospital : *Macrory & Black.*

Solicitor for the executors : *James A. Culbert.*

J. D. C.

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1927.Land Judge.  
June 7,  
Oct. 26,  
Dec. 17.

REID AND CURRY, Owners;

SIR F. H. MILLER AND USHER-SMITH, Petitioners.

(1924. No. 130.)

*Old Judgment—Judgment mortgage—Priority—Operation of judgment mortgage—13 & 14 Vic., c. 29, sec. 7—Destruction of Judgments Registry—Maxim, Omnia praesumuntur rite esse acta.*

On the ruling of the final schedule of incumbrances affecting lands comprised in the estate which was insolvent as to capital, several owners of judgments which had been entered up between Michaelmas term, 1823, and Trinity term, 1831, and prior to 3 and 4 Vict., c. 105, claimed priority to a judgment mortgage registered on 29th June, 1860, although primary evidence of compliance with the Act of Parliament requiring re-registration within five years prior to the registration of the judgment mortgage, was rendered impossible by the destruction of the Registry of Judgments in the year 1922.

Wilson J. *held* that the principle of the decision in *Eyre v. Macdowell* (9 H.L. Cas 619) applied and that the judgment mortgage did not obtain priority over a judgment registered under the statute 3 and 4 Vict. c. 105 but not re-registered within five years next before the registration of the judgment mortgage, and also *held* that in the absence of primary evidence the maxim omnia praesumuntur rite esse acta should be applied, and declared the judgments entitled to priority over the judgment mortgage.

CLAIM by John Wray and William Crawford, the executors of the will of John Scott, deceased, transferees of a judgment mortgagee against the lands sold herein for £500 registered the 29th March, 1860, by deed dated 23rd September, 1880, and made between Mrs. Mary Casey of the first part, Miss E. W. N. Curry of the 2nd part, and said John Scott of the third part. This judgment mortgage affected only lots 1 and 7, and the claimants—who were placed on the Final Schedule of Incumbrances at No. 13—claimed priority so far as above lots were concerned over claims appearing on the Final Schedule of Incumbrances in respect of judgments obtained in Michaelmas Term 1823; Hilary Term 1824; Hilary Term 1825; Easter Term 1825; Easter Term 1827; Hilary Term 1829; Hilary Term 1830 and Trinity Term 1831.

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*Megaw K.C.* and *Ellison* for the petitioners :—

A judgment mortgage can do no more than operate as a charge on such estate as the owner of the lands could validly transfer by deed.

*Eyre v. M'Dowell* (1) is an absolutely conclusive authority in favour of the petitioners. A judgment once registered under the Registration of Judgments Acts became a charge on the lands, and though not re-registered was binding against the owner of the lands. Such owner had only an estate or interest subject to such charge, and it was only on his estate, subject to such charge that the registration of a judgment under 13 and 14 Vic. c. 29 could operate.

[They also referred to *In re Boyse's Estate* (2).]

*M'Gonigal K.C.* for John Wray and William Crawford :—

The onus is upon those entitled to the judgments which are said to have priority to the judgment mortgage, to prove that their judgments were registered within five years from the registration of the judgment mortgage. The words in section 4 of the Judgment Mortgage Act, 1850, "within five years before the right of such creditor accrued," mean within five years of the right of the creditor becoming an effective charge on the lands of the judgment debtor, that is to say, within five years of the registration of the judgment as a mortgage. That onus has not been discharged here. In the two cases in which the certificates of the registration of the judgments have been preserved, it is manifest that they have not been registered within five years of the registration of the judgment mortgage. In the case of the other judgments no certificates are forthcoming, and no other proof has been offered. The decision in *Eyre v. M'Dowell* (1) is really in favour of the priority of the judgment mortgage. It decided that a judgment mortgage captures only what interest the debtor has in the lands, unless priority is expressly given by the Judgment Mortgage Act, 1850. But section 7 of the Act says that the registration of the judgment is to have the same effect as if a legal mortgage had been granted, and a legal mortgage

(1) 9 H.L. 619

(2) [1910] 1 I.R. 292.

would take priority over these judgments, unless the owners of them could prove that they were registered within five years of the registration of a legal mortgage. Section 4 also gives priority to creditors, unless the judgments were registered within five years before the rights of the creditors accrued, that is to say, before the registration of the judgment as a mortgage.

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The maxim omnia praesumuntur rite esse acta does not apply to a case like this. The judgments are valid and effective charges on the lands. They do not become void owing to the fact that it cannot be proved that they are registered within the five years. They are merely thereby postponed to the judgment mortgage. The fact that there were subsequent dealings for value does not avail. These might be dealings between members of a family or others who were content to take without inquiry. In the case of some of the deeds carrying the sales the solicitors who acted are still living and could testify as to whether they searched and found that the judgments had been duly registered within the five years.

*M'Neill* for the incumbrancers, item No. 6 on the Final Schedule of Incumbrances :—

The intention of the statute 13 and 14 Vic. c. 29 was to provide for re-registry of judgments every five years, or otherwise to render them invalid against purchasers for value, when not registered or re-registered within five years of the purchase. But the filing of an affidavit by a judgment creditor is not on the same footing as a conveyance for value, and he is not a purchaser for value within the meaning of the Act.

I rely on *Eyre v. M'Dowell* (1).

*Dougherty* for Henry M. Johnston, an incumbrancer.

*MacDermott* for Norman Rupert Asar Smythe, George Habgood, and Louise Elizabeth Frances Aylward, incumbrancers.

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WILSON J. : This estate up to the presentation of the petition had been solvent as to income, but on realization has turned out insolvent as to capital, and the funds are not sufficient to pay the claimants unless the priority claimed is established in whole or in part. Interest has been paid on the sums due on foot of all the incumbrances—including the aforesaid property and the claimants' judgment mortgage—up to the presentation of the petition, and no question arose as to the Statute of Limitations.

The contention on behalf of the claimant was that under sec. 3 and 4 of 13 and 14 Vic. c. 29 none of these judgments after the expiration of five years from the passing of that Act (15th July, 1850) affect lands, tenements or hereditaments as to purchasers, mortgagees or creditors unless and until a like memorandum or minute as is required for a registry thereof under 7 and 8 Vic. c. 90 shall be left with the officer appointed under that Act within five years before the execution of the conveyance, mortgage, lease or other deed or instrument vesting or transferring the legal or equitable right to the estate or interest in or to any such purchaser or mortgagee for valuable consideration or as to creditors within five years before the right of such creditor accrued, and under sec. 4 it was provided that after the expiration of five years from the date of such registry or reregistry of such judgments no such judgment shall affect lands, tenements or hereditaments as to purchasers, mortgagees or creditors unless or until a like memorandum or minute as was required in the first instance be again left with such officer as aforesaid within five years before the execution of the conveyance, settlement, mortgage, lease or other deed or instrument vesting or transferring the legal or equitable right to the estate or interest in or to such purchaser or mortgagee for valuable consideration, or as to creditors within five years before the right of such creditor accrued and so toties quoties at the expiration of every succeeding five years. The claimants' judgment mortgage was registered on the 29th day of March, 1860, and they contend that to obtain priority over this mortgage it was necessary for each of these judgment creditors to show that his judgment was reregistered under above sections between 30th March, 1855, and 29th March, 1860. One of the objects of the

Judgment Mortgage Act was to protect purchasers and mortgagees for value and creditors whose right had accrued, from old judgments that had not been registered or reregistered within five years before the purchaser or mortgagee advanced his money, and to have such purchaser or mortgagee affected only by such judgments as would be discovered by a search for the preceding five years in the Registry of Judgments. Such evidence was entirely destroyed by the deplorable fire in the Four Courts, Dublin, in 1922. Parties reregistering such judgments (though it was not compulsory to do so) could get certificates of such reregistration at the time of such reregistration. As to some of the judgments attacked exhibits of such reregistration certificates were made and it appeared that the last reregistration prior to 29th March, 1860, was in January, 1855, and not within five years before the registration of the judgment mortgage of 29th March, 1860. As to the others no certificates of reregistration, during the crucial five years or near thereto, are forthcoming and the claimants relied on the fact that these judgments were dealt with and sold for their full face value long after 1860 and up to a quite recent period. The owners of these judgments relied on the presumption *omnia praesumuntur rite esse acta* and asked me in the face of the destruction of the primary evidence of such reregistration to hold that they had been duly reregistered and the solicitors had done their duty on such purchases for value as aforesaid and ascertained that these judgments had been properly reregistered within five years before 29th March, 1860. All the owners of the judgments further contended that as all these judgments were entered up prior to the 3 and 4 Vic. c. 105, which converted them from being general liens on the lands of the judgment debtor into specific charges on such lands, and were good charges against such lands and valid against the judgment debtor and all persons claiming through him, save purchasers and mortgagees for valuable consideration and creditors whose right against the judgment debtor's lands had accrued, *Simpson v. Morley* (1), their validity could not be impeached by any judgment mortgagee. Such a

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mortgage could only affect the lands "for all the estate and interest of which the debtor mentioned in the affidavit registered under the Acts shall at the time of such registration be seized or possessed at law or equity or might at such time create by virtue of any disposing power which he might then, without the assent of any other person exercise for his own benefit," and gave the judgment creditor "all such powers and remedies as if an effectual conveyance, etc., to the creditor of all such estate or interest subject to redemption had been executed and registered at the time of registering such affidavit" (sec. 7 of 13 and 14 Vic. c. 29). The debtor could not on 29th March, 1860, execute any mortgage of these lands which could interfere with the specific charges good against him—whether reregistered or not—created by these judgments and 3 and 4 Vic. c. 105. The debtor could only convey the lands subject to the then existing charges binding the lands.

I was of opinion that the contention of the owners of these old judgments was correct and was the necessary result of the judgments of the House of Lords in *Eyre v. M'Dowell* (1). That was a contest between an unregistered prior equitable mortgage and a subsequent registered judgment mortgage. Lord Cranworth said at pp. 644 and 645: "It is hardly possible to suppose that the legislature (by 13 and 14 Vic. c. 29) could have intended so to alter the relative position of debtor and creditor as to enable the latter to satisfy himself out of property over which the former had no disposing power. If for any reason such a change had been contemplated we should surely have had some recital indicating an intention to make such an unusual deviation from principle. The statute to prevent the evil of the old judgments prior to 15th July, 1850, being a charge on all the debtors lands which impeded the transfer of all Irish land compels the judgment creditor to specify (sec. 6 of 13 and 14 Vic. c. 29) on what lands he means his debt to attach. When that is done there is nothing to show any intention of varying the rights of debtor and creditor, of putting them in a position different from that in which they certainly stood under the prior statute." Lord Wensleydale said at p. 651: "It seems to

me that this statute (13 and 14 Vict. c. 29) does not place the judgment creditor on the footing of a purchaser for the valuable consideration of the money payable by the judgment." In short the security obtained by the judgment creditor under 13 and 14 Vic. c. 29 is puisne to all charges and equitable liens which affect the lands named in the hands of the debtor himself whether the judgment creditor has notice of them or not. The charge obtained by a judgment mortgagee is confined to the lands named in the affidavit and as against those lands it takes precisely the same priority which a judgment would have had under 3 and 4 Vic. c. 105 against the whole of the debtor lands. It is, like the old judgment, founded on a judgment in invitum—the new affidavit under sec. 6 really only differs from the old affidavit to register or reregister the old judgment in The Registry of Judgments in the enumeration and identification of the debtor lands which the creditor proposes to charge. The old judgments did not lose their priority inter se by failure to reregister every five years *In re Boyse's Estate* (1). The whole law as to these old judgments, their entering, docketing, registering, etc., is fully stated by the late Mr. Justice Monroe in *In re Loughnan's Estate* (2), and applied in that case and in *In re Roche's Estate* (3), and I refer thereto. There is no reason in principle why a judgment mortgagee should have any greater priority than a judgment prior to the Act would have had. A judgment mortgagee is not a purchaser or mortgage for valuable consideration within the meaning of Secs. 3 and 4 of the Act. There is no execution of the mortgage by the mortgagor; there is no bargain for fresh money to be lent, no search to estimate the security; there is simply a debt, a judgment for that debt, and the registering of an affidavit by the judgment creditor against the debtor interest whatever it may be in the lands. The judgment creditor simply takes what he can get and is thankful sometimes. This is enough to negative the claimants' right to get the priority asked for in its entirety.

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As to the judgments, where no certificates of reregistration are forthcoming, and it has been proved that they were assigned for full value since 29th March, 1860, I am of opinion that the maxim omnia praesumuntur rite esse acta ought to be applied, having regard to the destruction by fire of all these records of The Registry of Judgments and these judgments so dealt in the money market ought not to lose their priority by such a fatality even if a judgment mortgage was a mortgage for valuable consideration within the meaning of sections 3 and 4 of 13 and 14 Vic. c. 29. I therefore refuse the claimant's application for priority and order him to pay the costs of all parties in the motion when taxed and ascertained, and I refer all such costs to the taxing master for taxation.

Solicitors for the petitioners : *Whitney, Moore & Keller.*

Solicitor for the executors of the will of John Scott, deceased : *John Wray.*

Solicitors for Edward Brice Kensit Norman and Charles Archibald Kensit Norman, the incumbrancers item No. 6 on the Final Schedule of Incumbrances : *Wilson & Simms.*

Solicitor for Henry M. Johnston, an incumbrancer : *F. G. Dickson.*

Solicitors for Norman Rupert Asar Smythe, George Habgood, and Louise Elizabeth Frances Aylward, incumbrancers : *C. & H. Jefferson.*

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In the Matter of the Petition of ALEXANDER HOWARD  
EGAN for a Divorce a mensa et thoro (1).

*Divorce—Domicil—Jurisdiction—Power to elect between  
Northern Ireland and Irish Free State.*

In a petition by the husband for divorce, on the ground of his wife's adultery, it appeared that at the date of the marriage the domicil of the husband was Irish and the domicil of the wife English. The marriage took place in Ceylon. The husband was born in part of Ireland which afterwards became the Irish Free State. The husband's father lived in various parts of Ireland, sometimes in what is now Northern Ireland, and sometimes in what is now the Irish Free State. The husband obtained a position in the Ceylon Civil Service in the year 1912 and had ever since resided there, except for periods of leave. There was one son issue of the marriage. The husband's father had lived in the Irish Free State until the year 1925, when he came to live in Northern Ireland, and purchased a house there. This house was purchased with the object of providing a home which should be available for himself and his son.

*Held* by Moore L.C.J. that the plaintiff could elect either to be domiciled in Northern Ireland or in the Free State, and that the petitioner having elected to be domiciled in Northern Ireland, the court had power to entertain the petition.

PETITION for divorce a mensa et thoro by the husband.

The petitioner's father was born in Ireland, and had lived there until he went to the United States, where he spent six years. He returned from America in 1878, and since that time had lived continuously in different parts of Ireland. The petitioner was born in the year 1889 at Dalkey, Co. Dublin, where his father was then residing. During the husband's early life his father lived at various places in Ireland, sometimes in what is now Northern Ireland and sometimes in what is now the Irish Free State. His father lived at Larne, Co. Antrim from 1894 to 1897, at Lisburn, Co. Antrim, from 1900 to 1903, at Lisburn also from 1906 to 1908, and at Belfast from 1909 to 1912. At other times he lived in what is now the Irish Free State. The petitioner was educated partly at Belfast, and partly at Dublin. He attained 21 years of age in the year 1910 whilst he was living in Dublin, and at that time his father was living in Belfast.

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The petitioner was admitted into the Ceylon Civil Service in the year 1912. He had ever since remained in Ceylon except for periods of leave. Before going to Ceylon he always resided with his father, and since then he had always spent his periods of leave with his father. He had never intended to reside permanently in Ceylon, and had always intended to come back to live permanently in Ireland, when his period of service in the Ceylon Civil Service should be ended. His father, who was a Methodist clergyman, retired from the Methodist Ministry in the year 1919, he being then stationed at Dalkey, where he continued to live until the year 1925. In that year he purchased a house at the petitioner's suggestion and with his assistance. As the petitioner was always anxious to have a home in Ireland, in which he could spend his periods of leave, in which he could reside when he retired from the Civil Service, but when the Irish Free State was established he determined that he would not live in that part of Ireland. He also wanted his son to be educated in Northern Ireland. He suggested to his father that he should take a house in Northern Ireland to live in himself, but which should be available for the petitioner, and also a residence for the petitioner's son when his education required it, and it was arranged that the petitioner should provide money for the purchase. His father was anxious to live in Dalkey, where he had many friends, but yielded to the petitioner's wishes and purchased the house in Belfast. The petitioner resided in this house with his father during his last period of leave. The petitioner stated that he had fully determined never to reside in the Irish Free State, but to make his permanent home in Northern Ireland, and to reside there save so far as his duties in the Ceylon Civil Service required his residence abroad. There was only one child of the marriage, a son.

The only question was whether the court had jurisdiction.

The petition was heard before Moore L.C.J. without a jury.

*Davison K.C.* and *Warnock* for the petitioner cited the following passage from *Dicey's Conflict of Laws* (4th Edition):—"The question as to the place or area within a country to which a person's intention of residence

applies may conceivably become of importance. Thus D, an Englishman, resides at Strasburg in 1914, and goes abroad without any intention of abandoning Germany as his home. He dies immediately after the cession of Strasburg to France. The question might arise as to whether D's domicile were French or German at the date of his death. The question ought, according to the principles maintained by the English Courts, to be determined with reference to D.'s intention. If, on the one hand, it were known that he intended to leave Strasburg, though not to abandon Germany, his domicile would be German. If, on the other hand, it were known that he intended to reside permanently at Strasburg, his domicile might be maintained to be French. The question was, through the separation of Queensland from New South Wales, nearly raised in *Platt v. Attorney-General of New South Wales* (1), but was not decided."

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*Porter* for the respondent.

MOORE, L.C.J. : Previous to the separation of Ireland into two parts the petitioner's domicile was Ireland, and not a particular part of it. I consider that the plaintiff could elect either to be domiciled in Northern Ireland or in the Irish Free State. He has elected to be domiciled in Northern Ireland, and the court therefore has jurisdiction to entertain his petition.

J. McC.

(1) 3 App Cas. 336.

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## URQUHART v. STRACEY AND OTHERS (1).

Feb. 21, 22,  
27 to 29.  
Mar. 1, 5,  
and 6 to 8.  
Ap. 17 to 19,  
and 24 and  
25  
May 14

*Acceptance of money from tortfeasor in satisfaction of damages for tort—Release of joint tortfeasors—Alternative causes of action tried together—Damages recoverable once only in respect of substantially same cause of action—R.S.C. (Ir.) 1905, Or. 18, r. 1, Statements in prospectus—Liability for—Companies (Consolidation) Act, 1908, 8 Edward 7, c. 69, sec. 84.*

The plaintiff had bought debentures in W.C. & Co., Ltd., on the faith of statements in a prospectus. Some of the defendants were directors in W.C. & Co., Ltd., and some were partners in an issuing house called S. & Co., who the prospectus stated had purchased the whole of the issue of debenture stock, but who plaintiff alleged had offered the debentures to the public and issued the prospectus merely as agents for the other defendants. The plaintiff claimed against all the defendants damages for fraudulent misrepresentations in the prospectus and for conspiracy to defraud and against such of the defendants as were directors in W.C. & Co., Ltd., claimed compensation under the provisions of the Companies (Consolidation) Act, 1908, section 84.

Brown J. at the trial ruled that there was no evidence proper to be submitted to the jury against the defendants, J.E., G.S.C., C.E.A., and G.E.C., directors in W.C. & Co., Ltd., in respect of any of the several causes of action in the statement of claim, dismissed the action as against the said four defendants with costs, and directed in favour of the remaining defendants (except F.W., who had died) in respect of the second and third causes of action. The action then proceeded against the remaining defendants until (by leave of the court) they amended their defence, and whilst denying liability, brought into court £130 which the plaintiff accepted in full satisfaction of the cause of action for fraudulent misrepresentation.

The plaintiff appealed and asked to have the direction given in favour of the said four defendants on the cause of action for fraudulent misrepresentation set aside.

*Held* by the Court of Appeal (Moore L.C.J. and Andrews and Best L.J.J.) that the plaintiff's acceptance of the money paid into court in satisfaction of the claim for fraudulent misrepresentation was a bar to any further proceeding for damages in respect of the same cause of action against the other alleged joint tortfeasors who made no such payment.

As to the claim for compensation under Section 84 of the Companies (Consolidation) Act, 1908, the court *held* that the plaintiff was entitled to have the alternative causes of action for compensation under this section and for misrepresentation and conspiracy submitted to the jury subject to two limitations, first, that he could not get damages more than once in respect of what was in substance the same cause of action,

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Reported Ante p. 40 on the question of liability for statements in a Prospectus under the Companies (Consolidation) Act 1908.

and second, that the causes of action, in the opinion of the trial judge, could conveniently be tried or disposed of together.

*Held* also, affirming the judgment of Brown J. on this point, that Section 84 of the Companies Act, 1908, is confined to a prospectus issued by or on behalf of the company, *but held* that the question whether S. & Co. were purchasers of the issue, or merely an issuing house or agents for the company, was one of fact on which there was sufficient evidence to entitle the plaintiff to have it submitted to the jury—the judgment of the trial judge being set aside in this respect.

*Held* further that in as much as the facts proved amounted to a *prima facie* case of conspiracy the defendants should have been called upon to answer it, and that as it was for the jury to determine whether the entire evidence established the existence of the conspiracy charged, the plaintiff was entitled to a new trial of this issue.

*Held* by Moore L.C.J. and Best L.J. that if the plaintiff succeeded on the cause of action under section 84 of the Companies (Consolidation) Act, 1908, he would be entitled to such “compensation” as he might prove, in addition to any damages already received in respect of fraudulent misrepresentation.

*Held* by Andrews L.J. (dissenting on this point only) that the measure of “compensation” under that section was the same as in the common law action of deceit, and that as the plaintiff had by acceptance of the £130 disentitled himself to any right to judgment for compensation in respect of the statutory tort, there should be no new trial in respect of this cause of action.

The action was brought by the plaintiff, as a debenture holder in Workman, Clark & Co., Limited. In February, 1920, the plaintiff, as he alleged relying upon a prospectus, applied for £200 7 per cent. first guaranteed debenture stock in Messrs. Workman, Clark & Co., Ltd. He paid the sum of £190, which was at the rate of 95 per cent. Of the defendants, Sir Edward Paulet Stracey, Bart., Sir Edward Mackey Edgar, Edward Welton, James Walter Strange, Eric Stephen Astleigh Sperling, and Edward Philip Andreae were sued as members of the partnership of Sperling & Co. Sir John Esplen, Sir George S. Clark, Bart., Robert Alfred Workman, Charles E. Allan, Frank Workman, and George Ernest Clark were sued as directors in Workman, Clark & Co., Limited. Sir Edward Mackey Edgar was sued in two capacities, as a member of Sperling & Co., and as a director in Workman, Clark & Co., Limited.

Damages were also claimed against the Northumberland Shipbuilding Company, Limited, now in liquidation.

In the course of the trial Frank Workman died, and the plaintiff treated the action as abated against him and his representatives.

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The plaintiff claimed against all the defendants damages for false and fraudulent misrepresentations in a prospectus and for conspiracy to defraud, and against such of the defendants as were directors in Workman, Clark & Co., Ltd., claimed compensation under the provisions of section 84 of the Companies (Consolidation) Act, 1908.

The trial judge, Brown J., being of opinion that there was no evidence proper to be submitted to the jury against the defendants who were directors in Workman, Clark & Co., Ltd., in respect of any of the several causes of action in the Statement of Claim, gave judgment dismissing the action as against these defendants with costs to be paid to them by the plaintiffs. The trial judge also directed in favour of all the remaining defendants (except Frank Workman) in respect of the second and third causes of action; and the action accordingly proceeded against such remaining defendants in respect only of the first cause of action until the 12th November, when, by leave of the court, they amended their defence, and whilst denying liability, brought into court £130, which the plaintiff accepted in full satisfaction of that cause of action as appears by the order of the court, dated 29th November, 1927.

The plaintiff appealed, and asked to have the direction given in favour of the four defendants on the cause of action for fraudulent misrepresentation set aside.

*Murphy K.C., Overend K.C.* (with them *Lowry K.C.* and *Russell*) for the plaintiff:—

The liability under Section 84 of the Companies Act, 1908, is a statutory liability and quasi contractual and is not a liability in tort. The effect of the section is to make directors impliedly warrant the truth of a prospectus which they issue. It gives contribution as in cases of contract unless the person liable was guilty and the other was not guilty of fraudulent misrepresentation.

[ANDREWS, L.J.: If the liability is contractual what was the necessity for the provision as to contribution?]

Assume a case where there were six directors where four were guilty of fraudulent misrepresentation—the four cannot recover contribution. If the statute said everyone should be liable then those guilty of fraudulent misrepresentation could recover contribution. We sub-

mit that the section was so drawn having regard to *M'Connel v. Wright* (1). That case was wrongly understood to decide that the statutory liability under the section is the same as in an action for deceit. If the section is quasi contractual then more is recoverable. The statute recognises a different liability from that in a case of fraudulent misrepresentation. Further, there are persons liable under the section who are not liable in tort at all. It is well established that a false statement made honestly is not actionable though damage ensues, *Angus v. Clifford* (2), *Arkwright v. Newbold* (3), but under the section a director who makes a statement which is false is liable. The section renders directors liable who did not authorize the issue of the prospectus—this would be a curious liability in tort. The use of the word “consent” suggests contractual liability. Section 84 is practically the same as section 38 of the Act of 1867. In *M'Connel v. Wright* (1) the prospectus was untrue at its date, but was made true shortly afterwards. See p. 553. This is an authority only under the Companies Act. There is no mention of compensation all through that case. The Master of the Rolls was thinking of damages. Cozens Hardy, L.J., had the Directors Liability Act in mind, but dealing only with damages all the members of the court had tort uppermost in their minds. The case was looked at from the point of view of damages not compensation.

Since that case a material alteration has been made in the law by the Companies Act of 1908. The closing words of sub-sec. 4 of section 84 show that the liability under the section is different from liability for fraudulent misrepresentation. The Act of 1908 has not been considered except in *Geipel v. Peach* (4). It decided that the liability to pay compensation for loss or damage is a liability in tort, and an action does not lie against an executor of tortfeasors unless a benefit has accrued through the tortfeasors' act. All the judges take the effect of section 38 of the Act of 1867 as extending the old liability at common law. We submit that this liability is a statutory one and that section 84 applies to all cases in which the result of the prospectus will be an original allotment of shares or debentures to subscribers,

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(1) [1903] 1 Ch. 546  
(3) 17 Ch. D. 301

(2) [1891] 2 Ch. 449  
(4) [1917] 2 Ch. 108.

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and is not confined to cases where a prospectus has been issued on behalf of the company. So long as the shares or debentures have to be allotted direct to the subscribers they will be in the control of the directors, who can correct untrue statements before allotment. This is recognised in sub-sec. (a) of section 84.

*Babington K.C.* (Attorney General) (with him *Monroe K.C.*, *Robb K.C.*, and *Warnock*) for the defendant, *C. E. Allan*; and *Pringle K.C.* (*Black* with him) for Sir George *S. Clark*, and *G. E. Clark*:—

The right of action given against directors by section 84 of the Companies Act is a remedy in tort, *Geipel v. Peach* (1), *Gerson v. Simpson* (2). The amount of the compensation recoverable under that section is the same as the damage which the plaintiff has recovered under the claim for misrepresentation.

The plaintiff has recovered all the damage which he proved in the action, and he has now no cause of action in conspiracy as damage is the gist of that action. The claims in the statement of claim are alternative only, and the claim for misrepresentation having been satisfied the plaintiff cannot recover on the claims for conspiracy, and for compensation under section 84.

The order of *Brown J.* should stand. We rely upon *Penny v. Wimbledon Urban Council* (3), *Beadon v. Capital Syndicate* (4), *Britt v. Galmoye and Nevill* (5).

The English practice has been altered by order 22, rule 8a, but there is no corresponding rule in Ireland.

*J. M. Whitaker K.C.* (with him *Ellison*) for the defendants, *Sperling & Co.*:—

The plaintiff elected to put all his damages on false representation, and the only evidence of damage was evidence of damage by reason of false representation. The full amount of the damage so proved was paid into court by Messrs. *Sperling & Co.*, and was accepted by the plaintiff, and he cannot recover any damages for conspiracy, not even nominal damages; damage is the gist

(1) [1917] 2 Ch. 108

(2) [1903] 2 K.B. 197

(3) [1899] 2 Q.B. 72

(4) 28 T.L.R. 394, 427

(5) 44 T.L.R. 294

of the action for conspiracy, *Thomas v. Moore* (1), *M'Connel v. Wright* (2).

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In order to sustain an action for conspiracy the facts proved by the plaintiff must be such that they cannot fairly admit of any other inference being drawn from them, *Sweeney v. Coote* (3).

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There was no evidence of intention to defraud the plaintiff; the acts of the directors may have diminished

the value of the plaintiff's security, but the directors were not trustees for the plaintiff who was merely a creditor of the company, *Poole, Jackson, and Whyte's Case* (4); those acts were merely ultra vires the company, none of them was malum in se. In any case there is no evidence against *Sperling & Co.* of conspiracy; the conspiracy which the plaintiff must prove is a criminal conspiracy, and a principal is not liable for the criminal act of his agent; a partner has no authority to bind his firm by his criminal act unless it is done by the express authority of the firm, and there is no evidence of express authority given by the firm to anyone.

*M'Gonigal K.C.* (with him *Ellison*) for the defendant, *R. A. Workman*, adopted the arguments which had been advanced on behalf of *Sperling & Co.* He referred to *Kerry v. England* (5), *Munday Limited v. The London County Council* (6).

*Cur. adv. vult.*

MOORE, L.C.J. : The judgment which I am about to read is, save in one respect, the unanimous judgment of the court. It has been arrived at by its members after mutual consultation.

May 14.

This is a case in which there has necessarily been a great deal of repetition, and we do not think it necessary again to recapitulate all the facts. The notice of appeal deals with three causes of action—

(1) [1918] 1 K.B. 555  
(3) [1907] A.C. 221  
(5) [1898] A.C. 742

(2) [1903] 1 Ch. 546  
(4) 9 Ch. D. 322  
(6) [1916] 2 K.B. 331

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(a) A claim for damages for false and fraudulent misrepresentation in a prospectus;

(b) A corresponding claim for compensation based on the provisions of Section 84 of the Companies (Consolidation) Act, 1908;

(c) Damages for conspiracy to defraud the plaintiff.

On November the 24th, 1927, the trial judge (Brown J.), being of opinion that there was no evidence proper to be submitted to the jury as against Sir John Esplen, Sir George Smith Clark, Bart., Charles E. Allan, and George E. Clark, in respect of any of the several causes of action in the statement of claim, gave judgment dismissing the action as against the said four defendants with costs to be paid to them by the plaintiff. The learned judge also directed in favour of all the remaining defendants (except Frank Workman, who had died) in respect of the second and third causes of action; and the action accordingly proceeded against such remaining defendants in respect only of the first cause of action until Monday, the 28th November, when, by leave of the court, they amended their defence and, whilst denying liability, brought into court one hundred and thirty pounds, which the plaintiff accepted in full satisfaction of that cause of action as appears by the Order of the court, dated 29th November, 1927.

It was not until the appellant had completed the opening of his statement before us, which occupied several days, that we were confronted by the Attorney-General, who represented the defendant, Charles E. Allan, with the difficulties arising from such a situation. The Attorney-General's objection that the plaintiff's acceptance of the sum lodged in court by certain tort-feasors released all other joint tort-feasors, was really in the nature of an objection *in limine*; but as he had not objected to the appellant's counsel discussing for so long every aspect of the case, we thought we should not treat it as such, but should hear the full arguments and express our opinion on all the issues in the case.

The first part of the notice of appeal asks to have the direction given in favour of the four defendants named on the cause of action for fraudulent misrepresentation set

aside, including of course that part of the judgment which gave them their costs, and further asks that they may be ordered to pay the plaintiff's costs in respect of the application to the Court of Appeal and the costs of the trial in respect thereof "rendered abortive by their application for a direction," with an alternative, which has not been argued before us, and which we do not therefore entertain.

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During the hearing of the appeal it was intimated to us by counsel that an agreement had been arrived at, as a result of which all further proceedings were discontinued as against Sir John Esplen, and that his name might be struck out of the appeal.

Assuming (but not for the present so deciding) that the ruling of the learned judge, in so far as he dismissed the three remaining named defendants from the first cause of action, was incorrect, and that therefore they ought still to be regarded as being parties to the action, we have now to consider the legal effect of the acceptance by the plaintiff of these moneys upon the particular defendants who made the payment in respect of the other causes of action brought against them, and upon the other three defendants in respect of all the causes of action pleaded. There is no doubt that if all the defendants were liable in respect of the several acts charged in paragraphs 2 and 3, they were joint tort-feasors, because they were joint perpetrators of the same tort, and therefore at common law a judgment against one of them would be a bar to an action against the others in respect of the same cause of action. In our opinion the result is the same when the plaintiff's claim is satisfied by payment. Bullen and Leake, 1868 Ed., p. 709, refers to a plea by several defendants sued as co-trespassers, and satisfaction made by one of them, *Bainbridge v. Lax* (1). There is a long list of authorities as to the liability of joint tortfeasors, of which *King v. Hoare* (2) is one of the earliest, down to the most recent in the Court of Appeal in England of *Goldrei Foucard &*

(1) 9 Q.B. 819.

(2) 13 M. & W. 494.

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*Son v. Sinclair and Others* (1) and "*The Koursk*" (2). *King v. Hoare* (3) was itself a case of joint debtors, but the judgment of Parke, B., states in explicit terms that the case of a joint contract and the case of a joint tort cannot in this respect be distinguished from one another. There is but one cause of action in each case. See also *Brinsmead v. Harrison* (4), which is everywhere accepted as good law.

We are therefore of opinion that the plaintiff's acceptance of the money paid into court in satisfaction of the claim for fraudulent misrepresentation, is now a bar to any further proceeding for damages in respect of the same cause of action against the other alleged joint tortfeasors who made no such payment; that they stand discharged by operation of law and cannot be further sued in respect of that cause of action.

The plaintiff's notice of appeal only asks that the judgment already given against him in favour of these particular defendants should be set aside. *Beadon v. Capital Syndicate* (5) was decided by the Court of Appeal upon the rules in force in England in 1912, which are the same as our present rules in Northern Ireland. That decision—we refer to the judgment in particular of Fletcher Moulton, L.J.—lays down the principle that either the trial judge had discretion as to the costs of the remaining parties, or, if he had not such discretion, then the Court of Appeal had it and should exercise it. We are of opinion that if the direction of the trial judge was correct, we should not alter that part of his order which gave these defendants their costs, but if it were wrong, then obviously these defendants should not get their costs.

We must, therefore, examine the facts to ascertain whether the direction was justified. But it must be remembered that we have no right, nor do we intend to express any concluded opinion upon the case, especially as no evidence was given at the trial on behalf of the defendants. Even if we had the material to do so, which we have not, it would be quite improper for us to indicate in advance

(1) [1918] 1 K.B. 180.

(2) [1924] P. 140.

(3) 13 M. & W. 494.

(4) L.R. 7 C.P. 547.

(5) 28 T. L.R. 428.

what course a subsequent jury should take. We have not to consider any question as to the weight of evidence. The learned judge ruled that there was no evidence fit to be submitted to the jury that these particular defendants made any false or fraudulent representations in the prospectus. The question for us to determine is whether he was right in so ruling. That conclusion obviously depends upon a question of fact, how far they were or became responsible for the prospectus. There is clear evidence that they knew all about it in advance; that they up to one period, at least, considered themselves responsible for it; that they had seen and discussed it and suggested amendments to the draft, one of which at least was accepted; that their names were appended to it for some purpose; and that up to the very date of its issue they were the sole directors of the Company. Mr. Justice Brown, 1st Vol. of Transcript, at p. 727, in his judgment summarises the effect of the evidence in similar terms, and adds: "But I can find no evidence to submit to the jury that these gentlemen, or any of them, made themselves responsible for the issue of this prospectus, either directly or indirectly." Without, we repeat, in any way suggesting what a jury should find upon this issue, we are all of opinion that there was sufficient evidence to entitle the plaintiff to have a finding one way or other on this question. It was for the jury to say whether the prospectus was issued, as the judge holds, by Sperlings on their own behalf, or whether they acted in the matter merely as agents for these defendants. It was likewise open to the jury to say, on the facts which were proved, whether the alleged sale of the debentures to Sperlings had any reality, or whether Sperlings merely lent their name to the issue to evade certain legal consequences which would otherwise have fallen upon Workman & Clark, so that the prospectus was in truth the prospectus of Workman & Clark, and of the defendants who were the directors. The learned judge was, therefore, in our opinion wrong in withdrawing this issue from the jury, and we set aside that part of the order, together with the direction for payment of costs by the plaintiff to these defendants which he made consequent thereon.

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The second matter of appeal is against so much of the judgment of the learned judge as directed in favour of all the defendants on the second cause of action, which was a claim for compensation under Section 84 of the Companies (Consolidation) Act, 1908. The first objection taken by the defendants was that this cause of action was pleaded in the alternative, and that the plaintiff could not recover or have his claim satisfied in respect of the cause of action in paragraphs 2 and 3 and, at the same time, proceed to a verdict on the cause of action in paragraph 4. The same objection was taken to the cause of action on conspiracy pleaded in paragraph 5, and our observations apply likewise to it. We are of opinion that subject to two limitations, it is permissible in this country for a plaintiff to go to the jury on as many alternative causes of action as he may have pleaded, if there is evidence to support them. The two limitations are, first, that he cannot by this means get the same damages more than once in respect of what is, in substance, the same cause of action, and, secondly, that it does not appear to the judge that such causes of action cannot conveniently be tried or disposed of together (Order 18, Rule 1). It is open to the plaintiff, if he succeeds on several alternative causes of action, to elect on which he will take his judgment.

It was argued, in the next place, that this cause of action under the Companies Act lay in tort; that the measure of compensation was accordingly the same as was the measure of damages for fraudulent misrepresentation; and that therefore this cause of action must be taken as being equally satisfied by the payment.

The present cause of action is a statutory civil liability. We are of opinion that it must be treated as in the nature of a tort, *Geipel v. Peach* (1), but it is a statutory tort, Fraud is not necessarily an element therein. Had it been regarded by the legislature as sounding in contract, it would have been unnecessary to insert the express provision conferring upon the defendants in certain circumstances a right inter se of contribution or indemnity. But in the opinion of the majority of the court (Andrews L.J. dissenting), the measure of damages is entirely different

from that under the common law action of deceit. The damages under the earlier cause of action are limited to the date of the allotment of the shares in respect of which the prospectus containing the false statements was issued. In our judgment, "compensation" implies something more than such damages, and includes all loss suffered by the plaintiff directly attributable to the making of the false statements. We are therefore of opinion that if there is evidence of such subsequent additional loss, as in our opinion there clearly is, the defendants are not released from liability under the section by the satisfaction of the earlier cause of action.

The Attorney-General further contended, on the authority of *Thomas v. Moore* (1) that when the cause of action for deceit disappeared, all other claims, the gist of which lay in damages, disappeared with it. We will deal with this matter at a later stage and merely say, for the present, we do not think that this contention is valid as regards the present cause of action.

The learned judge held that Section 84 applies only to prospectuses which are issued by or on behalf of the Company in respect of issues to which the public are invited to subscribe, and not to those in which they are invited by a third party to purchase the shares or debentures of a Company. We agree with the judge in his construction of the section. Two classes of prospectus fall within the definition of the term "prospectus" in the definition Section 285, namely, those which offer shares or debentures to the public (a) for subscription, or (b) for purchase; but it is only one of these classes which comes within the provisions of Section 84, as that section refers in express terms to a "prospectus which invites persons to subscribe" for shares or debenture stock. An offer or invitation to subscribe for shares is something essentially different from an offer or invitation to purchase them, the former referring clearly to an offer of unpaid shares which is to be accepted by allotment. *Palmer's Company Precedents*, vol. 1, 13th Ed., p. 13. The operation of the section is therefore limited in our opinion by the use of the word "subscribe" to the class of prospectus which is issued by or on behalf of the Company. It has no

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application to prospectuses issued by a shareholder for the sale of shares already issued or allotted by the Company. The point has never been judicially determined, but the view of the learned judge, which we indorse, had until recently the support of all the leading text book writers on the subject, Palmer, Buckley, Gore-Browne, and Halsbury. It is true that in the last edition of Palmer's Company Law the editors, without citing any authority or assigning any reason for the change, express a directly opposite opinion, which we are unable to accept. The section applies in our opinion only to prospectuses issued by or on behalf of the Company.

The learned judge, however, further held, and in this we disagree with him, that all the evidence pointed to Sperlings being the purchasers of this debenture stock. Whether Sperling & Company were purchasers of the issue or merely an issuing house or agents for the Company, was a question of fact on which there was sufficient evidence to entitle the plaintiff to have the issue submitted to a jury. Again, we guard ourselves carefully against giving any intimation as to what view a jury should take; but, considering the close relationship of Messrs. Sperling with the company, the fact that on several occasions they acted as agents for the company, and also for the Northumberland Shipbuilding Company, the fact that they did not sign the prospectus, the fact that though they are described as purchasers, the debenture stock was never allotted to them, the fact that the application forms for investors drawn by them only purported to invite them to procure an allotment for the applicant from the company, the three-fold capacity of Sir Edward Mackay Edgar, who was a director of the two companies and a partner in Sperlings, the failure of Sperlings to pay for the debenture stock within the time limited by the alleged contract, the nature of the account ultimately furnished by Sperlings to Messrs. Workman & Clark which in certain respects resembled more the account of agents than of purchasers—these were all considerations which might entitle the jury to find that there was no real purchase at all by Messrs. Sperling of the issue, that the use of the term “purchaser”

was a mere colourable device, and that the issue was really made by or on behalf of Workman & Clark which rendered the defendants, who were sued in respect of this cause of action, liable under the section as directors who authorized the issue of the prospectus. We, therefore, direct that the judgment in this respect should be set aside and that a new trial should be had in respect of this cause of action.

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The remaining part of the notice of appeal deals with the cause of action set out in paragraph 5 of the statement of claim, which charges all the defendants with conspiracy to defraud the plaintiff. The judge, page 902, Vol. 3, of the transcript, says that there is no evidence that "any one of the acts (alleged) was committed with that wrongful intent or that it tends towards that wrongful purpose which it was alleged was the purpose of this conspiracy." The first argument, however, which was addressed to us for the defendants was that even if there was any such evidence, satisfaction of the claim under paragraphs 2 and 3 extinguished the cause of action under paragraph 5 for conspiracy, and *Thomas v. Moore* (1) was strongly pressed upon us.

On examination we do not find that this case supports the proposition contended for by the defendants. That action was brought by several plaintiffs against several defendants really in respect of individual and separate causes of action for separate slanders, and jointly against them for conspiracy to slander. The jury found the slanders proved and awarded separate damages against the defendants. They also found the conspiracy proved against four of the defendants, but were not asked to find and in fact found no damages against such defendants jointly on the conspiracy, as it was apparently recognised that there were no joint damages distinct from and additional to the separate damages. The latter included the former. Mr. Justice Darling (now Lord Darling), in lieu of a judgment for damages for the conspiracy, gave a declaration that the said four defendants had unlawfully and maliciously conspired to injure plaintiffs by publishing defamatory statements of them. No such declaration had been asked for until after verdict. The Court of Appeal held that as damages were the gist of the action for conspiracy, and as the jury had found no damages on that

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count, that cause of action had gone, and that no declaration could be made in respect thereof.

We do not question the authority of that case, but in our opinion it does not apply to the facts of the present case. We have already stated that the measure of damages under the first cause of action is limited to the date of allotment. The damages for conspiracy may be calculated up to the expiration of a period nearly six years later. The first cause of action relates to the prospectus alone; the conspiracy charge, to a course of conduct culminating some years afterwards in which the first cause of action (misrepresentation), if proved, is only one of the earlier steps. Mr. Collins' evidence clearly attributes additional loss to the plaintiff through the action of the alleged conspirators subsequent to the date of allotment.

We do not consider that the plaintiff is, by reason of anything that has happened, precluded from treating this as an independent cause of action upon which, if he succeeds before a jury, he will be entitled to judgment for such damages as he may prove in addition to the damages which he has already received in respect of the alleged fraudulent misrepresentation.

Therefore we must now consider whether there was evidence of such a conspiracy which it was proper to have submitted to the jury. Again we hesitate to say anything which might suggest to a subsequent jury any view as to the course which they ought to take.

If there was a conspiracy to defraud the plaintiff as a debenture holder in the company, it is extremely improbable that such conspiracy could ever be proved by direct evidence. But in our judgment there was evidence in the alleged overt acts which ought to have been submitted to the jury for their finding as to the existence or non-existence of the alleged conspiracy on the part of the defendants. These acts, as proved, indicate and, if unanswered, might reasonably be held to establish, that by the joint action of the defendants the moneys of the plaintiff and others were obtained by a prospectus alleged to be fraudulent and misleading; that acts were done, covering a considerable period of time by such of the defendants as had the management and control of the Company's affairs, which were at least *ultra vires*; that the apparent result of the

whole series of such acts was to transfer practically the entire assets of the Company to the Northumberland Ship-building Company, thereby seriously depreciating the security for the debenture issue. We are of opinion that the facts proved amounted to a *prima facie* case of conspiracy which the defendants should have been called upon to answer, and that it was for the jury and not for the judge to determine whether the entire evidence established to their satisfaction the existence of the conspiracy charged against all or any of the said defendants.

We therefore hold that the judge was wrong in the direction which he gave in this matter and that the plaintiff is entitled to a new trial in respect thereof.

In conclusion, we wish to say that as this is an action in which we have ordered a new trial, we have curtailed our judgment to the narrowest possible compass and have deliberately refrained from expressing any opinion upon the facts which might prove embarrassing to either a judge or jury at such trial. Indeed, we may say that we have formed no opinion on the merits of the case as between the parties, for it would be quite impossible to do so on the only evidence which was adduced at the trial, namely, that which was given by or on behalf of the plaintiff. There was nothing in our opinion to prevent the jury, had the issues been put before them, and after hearing the defendants' case, from coming to the like decision as the trial judge, or to some different conclusion, if warranted by the entire evidence; but, whatever might be in their opinion the true view of the facts, the questions were essentially questions of fact which should have been determined by the jury, and not by the learned judge.

It is for these reasons only that we allow the appeal.

We were asked not to make any pronouncement as to costs until we had heard counsel, and we are now prepared to do so.

ANDREWS, L.J.: It is with great regret that I feel compelled to dissent from my colleagues upon one issue arising in connection with the cause of action for compensation under Section 84 of the Companies Act, 1908. I entirely concur in the view that that cause of action is in

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the nature of a statutory tort. I further agree that the section applies only to prospectuses which are issued by or on behalf of the company in respect of shares or debentures to which the public are invited to subscribe. I further agree that, on the evidence, the plaintiff was entitled to have a question submitted to the jury as to whether Sperling & Company were purchasers of the issue, or were merely acting as an issuing house or as agents for the company. But I regret that I cannot agree with them in their view that the measure of damages under the section is entirely different from that under the common law action of deceit. In my opinion they are the same. The relevant words of the section are "Compensation . . . for the loss or damage . . . sustained by reason of any untrue statement . . ." Thus, whilst the section confers on the injured persons the right of recovering "compensation," such compensation is expressly limited to loss or damage sustained by reason of the untrue statement. I am strengthened in my opinion by a consideration of the object which the legislature had in view in passing the Directors Liability Act, 1890, on which section 84 of the Companies Act, 1908, is based. This object is clearly stated in the judgment of Cozens Hardy, L.J., in *M'Connel v. Wright* (1). "The Directors Liability Act," he says, "was passed in 1890, the year after *Derry v. Peek* (2) had been decided in the House of Lords, and, as it seems to me, for the express purpose of getting rid of the effect of that decision so far, *and so far only* (the italics are my own), as directors and promoters issuing a prospectus on the one hand, and persons taking shares and debentures on the other hand, are concerned. In that particular case the plaintiff has only to prove, in addition to damage, that a material statement of fact is untrue, and he can maintain an action, unless the defendant can establish that he had reasonable ground to believe and did believe the statement to be true."

I entirely concur in the view thus expressed by the learned Lord Justice. Actual fraud is of the essence of an

(1) [1903] 1 Ch. 546.

(2) 14 A.C. 337.

action for deceit; and a false statement, if made in the honest belief that it is true, is not fraudulent, and does not render the person making it liable to an action for deceit. This was clearly established in *Derry v. Peek* (1). It was felt by the legislature that the law as so enunciated was too lax as regards the making of false statements in prospectuses; and, accordingly, it was enacted in the Directors Liability Act (and now in section 84 of the Act of 1908) that, subject to certain exceptions, the mere making of false, as distinguished from fraudulent, statements should be actionable and compensation recoverable. To this extent, but to this extent only, it was the intention of Parliament to amend the law in favour of persons who sustain loss and damage by reason of the making of any such untrue statement. I can find no evidence, either in the words of the section or in the purpose with which it was passed, of an intention to increase the measure of damages; and it would be to me a strange, if not startling, result if the measure of compensation for what, at least morally speaking, is obviously the less serious offence should be held to be greater than the measure of damages for a much more grievous wrong.

In the view which I have expressed as to the true measure of compensation I am confirmed by the leading text book writers. See Buckley on Companies, 10th Ed., p. 193, and Palmer's Company Precedents, 13th Ed., vol. 1, p. 210. Further, I find that in *Broome v. Speak* (2), in which the plaintiff brought an action claiming under section 38 of the Companies Act, 1867, to have a prospectus declared fraudulent with damages, and also under the Directors Liability Act, 1890, compensation for the alleged "untrue statement" in the prospectus, Buckley, J., having arrived at the conclusion that a case had been established under both Acts (p. 604), passed at p. 605 to the question of damages. "The measure of damages," he said, "is well fixed—it is the difference between the price which the plaintiff paid for the thing and the fair value of the thing at the date at which he got it." This is precisely the measure of

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(1) 14 A.C. 337.

(2) 1903 1 Ch. 586.

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damages in an action of deceit, and the learned judge makes this still more clear by the quotation which follows from the judgment of Cotton, L.J., in *Derry v. Peek* (1). This case of *Broome v. Speak* (2) came before the Court of Appeal, and also (sub nomine *Shepherd v. Broome* (3)) before the House of Lords, and in none of the judgments or speeches in either court was there any expression of dissent from the view of Buckley, J., as to the true measure of damages. Finally, the question arose again before Joyce, J., in *Stevens v. Hoare* (4), a case which was not cited to us in argument. In this action no claim was made in respect of deceit or fraudulent misrepresentation. Relief was sought solely under the Directors Liability Act, 1890, and section 38 of the Companies Act, 1867. In dealing with the cause of action under the Act of 1890, section (3) (1), which contains the same material words as to compensation as section 84 of the Companies Act of 1908, Joyce, J., says at p. 409: "The measure of such damage is now, as I consider, well settled to be the difference between the price paid for the shares and their real value at the date of the notice of the allotment being posted to or reaching the person who subscribed for shares." Here is a clear expression by a high judicial authority that it is in his opinion settled law that the measure of damages or compensation under the section is the same as the measure of damages in an action of deceit. With his opinion I fully agree, and I respectfully adopt the language of the learned judge as my own.

I should add that quite apart from the view which I have expressed as to the true measure of compensation under the section, I can find no evidence of any damage which the plaintiff suggests could be recovered as compensation under the section and which would be irrecoverable on the cause of action for fraudulent misrepresentation or deceit. On the evidence both damages and compensation, if payable, are in my opinion covered by the payment of £130.

The importance of the view which I have expressed is this, that, as the plaintiff could not in my opinion recover

(1) 14 A.C. 337.  
(2) [1903] 1 Ch. 586.

(3) 1904 A.C. 342.  
(4) 20 T.L.R. 407.

any larger sum in respect of compensation under section 84 than in respect of damages for the alternative cause of action for fraudulent misrepresentation, and as the latter cause of action has been admittedly satisfied by the plaintiff's acceptance of the money paid into court, the plaintiff has, by such acceptance, disentitled himself in my opinion to any right to judgment for compensation in respect of the statutory tort. Accordingly, on this ground, but on this ground alone, there should in my opinion be no new trial in respect of this cause of action. As the direction in favour of the defendants sued upon this cause of action was, however, given by the learned judge prior to the payment into court and its acceptance, I agree that it was at the time wrongly given, and that the judgment entered for such defendants, with costs consequent upon such direction, should be set aside.

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Solicitor for the plaintiff : *T. Erskine Alexander.*

Solicitors for the defendants, Sir Edward Paulet Stracey, Bart., Edward Welton, Sir Edward Mackay Edgar, James Walter Strange, Eric Stephen Astleigh Sperling, Edward Philip Andrae : *Johns, Elliot & Johns.*

Solicitors for the defendant, Charles E. Allan : *M'Lean & Son.*

Solicitor for the Northumberland Shipbuilding Company, Limited : *Robert Wallace.*

Solicitor for the defendants, Sir George S. Clark, Bart., and George E. Clark : *Robert Wallace.*

Solicitors for the defendant, R. A. Workman : *Johns, Elliot & Johns.*

J M'C.

On the cause of action for fraudulent misrepresentation the court made an order " that the judgment entered on the 24th day of November, 1927, in favour of the defendants, Sir John Esplen, Charles E. Allan, Sir George S. Clark and George E. Clark, be set aside, and declared the plaintiff entitled to his costs referable to the said cause of action up to and including the 24th

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day of November, 1927 [the date on which the directions were given by the trial judge], as against all the defendants other than the Northumberland Shipbuilding Company, Limited, and the said Sir John Esplen, and from the 24th day of November, 1927, up to and including the 28th day of November, 1927, as against the defendants, Sperling & Company, the said Sir Edward Mackay Edgar and Robert Alfred Workman only:" the court also set aside the judgment entered in respect of the causes of action under section 84 of the Companies (Consolidation) Act, 1908, and for conspiracy, with costs referable to these causes of action, as against all the defendants other than the Northumberland Shipbuilding Company, Limited, and Sir John Esplen up to 24th day of November, 1927, and from that date as against the defendants, Sperling & Company, Sir E. M. Edgar and R. A. Workman only.

J.McC.

[IN THE COURT OF APPEAL.]

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July 3.

## APSLEY v. BARR (1).

*Landlord and tenant—Statutory tenant—Re-marriage of the widow of statutory tenant who had died intestate—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12, sub-s. 1 (g).*

The plaintiff was the owner of a dwelling-house subject to the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The premises had been let as a weekly tenancy in or about the year 1923 to J. M'N., who was then in the plaintiff's employment, at the rent of 5s per week. J. M'N. died intestate in June, 1926, leaving the defendant, his widow (who up to the time of his death resided with him. On the death of her husband the defendant remained in occupation and entered into legal possession of the house under section 12 (1) (g) of the Increase of Rent, Etc. (Restrictions) Act, 1920. The defendant married again in March, 1928, and her second husband and his children came to reside in the house occupied by her. The landlord instituted ejectment proceedings against the defendant, who claimed the protection of the Increase of Rent (Restrictions) Acts. Section 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides that "the expression tenant includes the widow of a tenant dying intestate who was residing with him at the time of his death."

*Held* by the Court of Appeal (Moore L.C.J. and Best L.J.) that the widow acquired a vested interest as tenant, and there was nothing in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which divested this interest on her second marriage.

CASE STATED by Andrews L.J. on appeal from a dismissal pronounced by the Acting County Court Judge of County Antrim on the hearing of a Civil Bill for the recovery of possession of a dwelling-house as follows:—

It appeared that the premises were let about five years ago by the plaintiff to one James M'Nally, who was then in the plaintiff's employment, as a weekly tenancy at the rent of five shillings per week. James M'Nally died, intestate, in the month of June, 1926, leaving the defendant his widow (who was residing with him at the time of his death) him surviving. It is admitted that the premises constitute a dwelling-house to which the provisions of the Increase of Rent Acts applied and that on the death of her husband the defendant remained in occupation and entered into legal possession of the house under section

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12 (1) (g) of the Act of 1920. Subsequently in November, 1926, the rent of five shillings per week was increased to seven shillings per week by mutual agreement without the prescribed notice having been served to determine the tenancy or to increase the rent. Such increased rent has since been paid and accepted weekly without objection. The defendant married one Thomas Barr in March, 1928, and he and his children came to reside in the house occupied by the defendant. Thereupon a notice to quit dated 29th March, 1928, was served on the defendant demanding possession of the premises on 7th April, 1928; and on failure by the defendant to deliver up such possession an ejectment civil bill was duly served on the defendant in April, 1928.

The plaintiff based his claim for possession on two grounds :—

- (a) That he required the dwelling-house for occupation as a residence for a person engaged in his whole time employment; and
- (b) That the defendant ceased to be a tenant entitled to claim the protection of the Acts when she married Thomas Barr and was no longer a widow.

On the evidence I ruled against the plaintiff on the first of the foregoing contentions.

In reply to the second contention the defendant submitted :—

- (a) That she became a tenant on the death of her first husband as his widow, and that there was no provision in the statutes which deprived her of her rights as such tenant on her second marriage; and
- (b) That by the agreement of November, 1926, whereby her rent was increased from 5/- per week to 7/- per week a new tenancy was created directly between the plaintiff and her in her own right, and that this tenancy was not affected by her second marriage.

No authority was cited on either side.

Counsel for both parties pressed me for a case stated if I were against their contentions and I accordingly agreed to state this case.

The question for the opinion of the court is whether on the foregoing facts and submissions the plaintiff is entitled to possession of the said dwelling-house.

If the answer to this question be in the affirmative, the dismiss of the Acting County Court Judge will be reversed and a decree granted with costs in the court below and on appeal. If the answer be in the negative the dismiss will be affirmed with costs in both courts.

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*T. J. Campbell K.C.* and *Porter* for the plaintiff :—

The object of this section was to prevent the family of a deceased tenant from being put out of their home. The widow is given protection qua widow; if she re-marries she is no longer a widow and the protection ceases. The law naturally assumes, that if the widow re-marries, she will go to live with her new husband. This is not the case of an interest absolutely vested once for all becoming divested, it is a case of temporary protection during widowhood. In the New English Dictionary a widow is defined as “a woman whose husband is dead and who has not married again.”

*Pringle K.C.* and *M'Sparran* for the defendant :—

If a testator gives a bequest of an annuity to his widow, the annuity continues to be paid to her, even should she marry again, unless the bequest of the annuity is during widowhood. The same section of the Increase of Rent, Etc., Restrictions Act, 1920, was construed by the King's Bench Division in England in *Salter v. Lask* (1), where it was held that the husband of a statutory tenant who had died intestate had such an interest in the premises as entitled him to maintain an action of ejectment against a sub-tenant.

MOORE, L.C.J. : The section conferred a certain right upon the defendant as widow and there is no clause divesting her of that right upon her re-marriage, although this could have been done by the introduction of a few words, and I do not think that the court should construe the section as if the Act contained a divesting clause.

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In my opinion the widow acquired a vested interest as tenant and there is nothing in the Act which suggests the divesting of this interest upon her second marriage.

BEST, L.J., concurred as to the construction of the section, and further expressed the opinion that no new tenancy had been created by the increase of the rent by the landlord after the death of the defendant's former husband.

Solicitor for the plaintiff: *J. W. M'Ninch.*

Solicitor for the defendant: *H. H. Smiley.*

J. McC.

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(1928. No. 88.)

*Company—Receivers appointed by debenture holders—Preferential payments—Workmen's compensation—Abolition of limitation of amount to £100—Whether retrospective—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 5—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 107 and s. 209—Workmen's Compensation Act (Northern Ireland), 1923 (13 & 14 Geo. 5, c. 33), s. 19 and Scheds. I & II.*

W. G., a workman in the employment of W. C. & Co., Ltd., having been injured in the course of his employment on 18th November, 1920, was in receipt of weekly compensation under the Workmen's Compensation Acts. On 1st February, 1928, J. M. and H. S., who were receivers appointed on 28th January, 1928, by certain debenture holders in W. C. & Co., Ltd., entered into possession of the assets of the company.

W. G. brought an action against J. M. and H. S. claiming to be paid in full the lump sum for which his weekly payments could have been redeemed, if the employer had made application for that purpose under the First Schedule to the Workmen's Compensation Act, 1906, equally with the other debts mentioned in section 209 of the Companies (Consolidation) Act, 1908, and in priority to all other debts, out of any assets coming into the hands of J. M. and H. S.

*Held* (by Wilson J.) that the workman was entitled to the whole of the amount due to him for compensation as a preferential debt without any limitation to £100 as mentioned in section 5, sub-s. 3, of the Workmen's Compensation Act, 1906, the liability for such compensation having accrued before the receivers were appointed or took over possession of the assets of the Company, and whether or not the accident occurred before 1st January, 1924 (i.e. the date on which the Workmen's Compensation Act (Northern Ireland), 1923, came into operation).

The plaintiff Walter Graham, while in the employment of Workman, Clark & Company, Limited, sustained personal injuries as the result of an accident arising out of and in the course of his employment on 18th November, 1920. He was accordingly in receipt of weekly compensation on 1st February, 1928, when the defendants, J. Raymond Maskell and Hugh Smylie, receivers appointed on 28th January, 1928, by certain debenture holders, took possession of the assets of the company. The plaintiff

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brought an action against the defendants claiming to be paid in full the sum of £710 10s 0d, being the lump sum for which his weekly payments could have been redeemed, equally with the debts mentioned in section 209 of the Companies (Consolidation) Act, 1908, and in priority to all other debts, including the principal and interest due on the debentures, out of the assets coming into the hands of the defendants.

The defence admitted the right of the plaintiff to have the sum of £100, mentioned in section 5 of the Workmen's Compensation Act, 1906, paid to him as a preferential payment, and this sum was brought into court.

*T. J. Campbell K.C., Porter and Macauley for the plaintiff:—*

The lump sum of £100 is first mentioned in section 5, sub-s. 3, of the Workmen's Compensation Act, 1906, and the provisions of this section are extended by section 107, sub-s. 1 and section 209, sub-s. 1 (d) of the Companies (Consolidation) Act, 1908, to cases in which a receiver is appointed by holders of debentures secured by a floating charge. The limitation of the amount of the preferential payment to £100 is removed by section 19, sub-s. 2, of the Workmen's Compensation Act (Northern Ireland), 1923. This Act came into operation on 1st January, 1924, and we submit that the receivers, having been appointed and having taken possession of the assets after that date, are bound by section 19. *In re Clemmons Aluminium, Limited* (1) and *In re Snowdown Colliery, Limited* (2) decide that the corresponding section of the English Workmen's Compensation Act, 1923, does not operate retrospectively, but in both these cases the receivers had been appointed before the Act of 1923 had come into force. In *Dixon v. Ferguson* (3) the judgment was limited to section 21 of the Northern Ireland Act and did not deal with section 19.

We submit that in the present case the plaintiff's right did not accrue until after the receivers had been appointed or had gone into possession of the assets, that is after the Workmen's Compensation Act (Northern Ireland), 1923,

(1) 41 T.L.R. 138

(2) 41 T.L.R. 326

(3) 58 I.L.T.R. 129

had come into operation, and accordingly the workman is entitled to the full sum of £710 10s 0d. Ch. Div. 1928.

[They also referred to *Briggs v. Dryden* (1), *Moakes v. Blackwell Colliery Company, Limited* (2), *Clement v. Davis* (3) and *Clarke v. United Steel Companies* (4).]

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*Murphy K.C.*, *Pringle K.C.* and *Fox* for the defendants :

The accident having occurred in 1920 the rights of the workman are governed by the statutes then in force. We rely on section 38 of the Interpretation Act, 1889. Unless there is an express provision in the Workman's Compensation Act (Northern Ireland), 1923, making section 19 retrospective, the section has no application to accidents which happened prior to the passing of that Act. In reading section 19, regard should be had to the fact that the same words were used in the Workmen's Compensation Act, 1906, in which they could not have a retrospective meaning.

We admit that there is no authority which exactly decides the question in issue, but every case cited by counsel for the plaintiffs, by analogy supports the case which we seek to make.

[They also referred to *In re Clemmons Aluminium, Limited* (5), *In re Snowdown Colliery, Limited* (6), *Briggs v. Dryden* (1) and *Clement v. Davis* (3).]

*Porter*, in reply :—

The plaintiff had no vested right against the defendants in 1920. His claim did not accrue until they had been appointed or had gone into possession of the assets of the company in 1928, and consequently his rights are governed by the Workmen's Compensation Act (Northern Ireland), 1923.

*Cur. ad. vult.*

WILSON, J. : This claim is based on section 5 of the Workmen's Compensation Act, 1906, sections 107 and 209 of the Companies (Consolidation) Act, 1908, and June 11

- (1) [1925] 2 K.B. 667  
(2) [1925] 2 K.B. 64  
(3) [1927] A.C. 126

- (4) 18 B.W.C.C. 525  
(5) 41 T.L.R. 138  
(6) 41 T.L.R. 326

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section 19 and the First and Second Schedules of the Workmen's Compensation Act (Northern Ireland), 1923. The defendants contend that under the above Act of 1906 it was only £100 of the lump sum which became a preferential debt, and then only when the employer became a bankrupt or made an arrangement with his creditors, or, if a company, where the company had commenced to be wound up, and this did not extend to a taking possession on behalf of debenture holders. Further, that the Act of 1906 applied, save an immaterial exception, only where the accident happened after the commencement of that Act, viz., 1st July, 1907 (see section 16 of that Act). The defendants admit that sections 107 and 209 of the Companies Act, 1908, extended the above provisions to the cases where a receiver is appointed on behalf of the debenture holders or possession is taken by or on behalf of those debenture holders, but say it is confined to £100 of the lump sum and would only affect cases where the accident happened after the commencement of this Act (viz., 1st April, 1909). I am of opinion that the last of their contentions is not correct. There is no section in the 1908 Act similar to section 16 of the Act of 1906. By the Act of 1906 workmen were entitled to be paid a preferential £100 if a company employer was being wound up. The evil to be avoided was the non-payment of this £100 in the event of possession being taken by prior debenture holders where the company was not being wound up. The injury to the workmen injured was just as great in that case as where the company was being wound up. Section 107 of the Act of 1908 merely included a *casus omissus* in the prior Acts, viz., where possession is taken or a receiver is appointed by prior debenture holders and the company is not being wound up. The words of section 209 "in a winding up there shall be paid in priority to all other debts—" (1) Rates due from the company at the date hereinafter mentioned and having become due within 12 months next before that date and certain taxes assessed on the company up to the 5th day of April next before that date not exceeding one year's assessment."

(The date referred to is the date of the commencement of the winding up or of the winding up order. This clearly means that after 1st April, 1909, in any winding up there shall be paid, in priority to all other debts, rates due from

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the company at the commencement of the winding up or at the date of the winding up order. It cannot mean also provided such rates or taxes have accrued due after 1st April, 1909.)

“(2) All wages or salary of a clerk or servant in respect of services rendered to the company during four months before the commencement of the winding up or the winding up order.”

(Ex vi termini this cannot mean provided the four months services have been rendered after the 1st April, 1909.)

“(3) Wages of a workman not exceeding £25 in respect of services rendered to the company during two months before the commencement of the winding up.”

(Similarly this applies after 1st April, 1909, whether these services were rendered during two months after 1st April, 1909, or before, or partly before and partly after that date, and cannot be confined to two months' services rendered to the company after 1st April, 1909.)

“(4) All amounts (not exceeding in any one case one hundred pounds) due in respect of compensation under the Workmen's Compensation Act, 1906, the liability wherefor accrued before the commencement of the winding up or the date of the winding up order.”

(Can anyone think that this means “not an amount due in respect of compensation before the commencement of the winding up” but an amount due on and after 1st April, 1909, and before the commencement of the winding up, provided the accident in respect of which the amount is due occurred after 1st April, 1909?)

At any rate counsel have not been able to refer me to any case where, after 1st April, 1909, the amount due (not exceeding in any one case £100) has not been paid by the liquidator or receiver where the liability for the amount due accrued before the commencement of the winding up. It must be remembered that as regards this lump sum section 209 (d) is only a re-enactment of section 5, sub-s. 3 of the Act of 1906, and the construction contended for by the defendants would deprive the workmen of benefit secured to them since 1st July, 1907, in respect of all accidents resulting in compensation which occurred after 1st July, 1907, and prior to 1st April, 1909. Also the Act of 1908 repealed in its 6th Schedule the 4th section of the

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Preferential Payments in Bankruptcy (Ireland) Act, 1889, and by so doing prevented after 1st April, 1909, the working of section 5, sub-s. 3, of the Workmen's Compensation Act, 1906, under which the workmen injured by accident after 1st July, 1907, got this benefit. This was the law from 1st April, 1909, till 1st January, 1924, when the Workmen's Compensation Act (Northern Ireland), 1923, came into operation. By section 27 of that Act the provisions of sections 2 to 10 thereof and of the amendments of any scheme made in pursuance thereof shall not apply to any case where the accident happened before 1st January, 1924. As to the rest of this Act the provisions of each section must be considered to see if they apply or not to accidents occurring before 1st January, 1924, as well as after. Some of them clearly apply to accidents which occurred before 1st January, 1924, and counsel on both sides and the Court of Appeal in England assumed without argument that section 16 applied to accidents which occurred before 1st January, 1924. Then comes section 19, which deals with the same cases as were previously dealt with by section 107 of the Companies (Consolidation) Act of 1908, and in section 19, sub-s. 2, does away with the limitation to £100 in any individual case of the amounts due by way of compensation which, under section 5, sub-s. 3, of the Act of 1906 are to be included amongst the preferential debts, and in section 19, sub-s. 3, provides that section 5 of the Act of 1906 shall have effect, subject to the amendments mentioned in the First Schedule in the Act of 1923, viz., by inserting in section 5 of the Act of 1906 after the words "in the event of a company having commenced to be wound up" the words "or a receiver or manager of the company's assets by or on the application of debenture holders having been appointed," and substituting for section 5, sub-s. 3, the following sub-s. which provides that there shall be included amongst the debts which under section 107 of the Act of 1908 are to be paid in priority to any claim for principal or interest in respect of debentures, the amount due in respect of any compensation or liability for compensation accrued before the following date (viz., the date of the appointment of the receiver or of possession being taken) mentioned in the said section 107. On its terms alone, this means that, after 1st January, 1924, the limitation to £100 in section 5, sub-s. 3, is done away with, and the total amount due in

respect of any compensation or liability for compensation accrued before the taking of possession by the defendants is payable to the workman. This is quite general, yet it is contended that a proviso must be added, viz., provided the accident in respect of which the compensation or liability for compensation accrued, took place after 1st January, 1924.

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Taking then, the case of an accident occurring on 1st December, 1923, out of which the right to compensation arises, and the amount due for compensation is ascertained after 1st January, 1924, and possession is taken by the debenture holders after 1st January, 1924, what would happen? The accident having taken place before 1st January, 1924, then according to defendants' contention, section 19 and the First Schedule to the Act could not apply, as it can only refer to accidents after 1st January, 1924, but under section 107 of the Act of 1908 the amount due becomes a preferential debt, and under section 209 of the Act, 1908, the words in paragraph (d) of sub-s. 1 of section 209, "not exceeding in any individual case £100" being repealed as from 1st January, 1924, by the Second Schedule of the Act of 1923, section 209 reads at the date of taking possession by the debenture holders (which is after 1st January, 1924) "there shall be paid in priority to all other debts all amounts due in respect of compensation under the Workmen's Compensation Act, 1906, the liability wherefor accrued before the possession was taken, subject to the provisions of section 5 of that Act," and this section 5 is also repealed as from 1st January, 1924. Surely the same result must happen when the accidents took place in 1915 and 1920 as in this case? It seems to me to be clear, both on the words of section 19 and of the First Schedule of the Act of 1923, that after 1st January, 1924, the whole of the amount due to the workman for compensation is to be paid to the workman as a preferential debt without any limitation to £100 where the liability for such compensation accrued before possession of the company's assets was taken on behalf of the debenture holders, and whether the accident occurred before or after 1st January, 1924. It is then contended that this would give this Act of 1923 a retrospective effect and would interfere with vested rights, viz., the rights of the

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debenture holders and the ordinary creditors of the company. No doubt it would do so.

It is said that this would be contrary to the maxim *Omnis nova constitutio futuris formam imponere debet non praeteritis*. As to that the Privy Council in *Reynolds v. Attorney General for Nova Scotia* (1), says "this maxim has been applied to the extent that a new law ought to be construed so as to interfere as little as possible with vested rights, and in *Main v. Stark* (2) the Earl of Selborne says words not requiring a retrospective operation so as to affect an existing status prejudicially ought not to be so construed. Yet the result is that in all cases it is necessary to ascertain what the legislature meant."

It seems to me clear, whether you consider section 19 and the First Schedule of the Act of 1923, or merely take section 29, sub-s. 5, and the Second Schedule of the same Act which repeals in paragraph (d) of sub-s. 1 of section 209 the words "not exceeding in any individual case £100," the Northern Ireland Legislature enacted that after 1st January, 1924, where possession of a company's assets has been taken by debenture holders, the total amount due to an injured workman under the Acts before the time of taking possession is payable by the receiver or other person so in possession forthwith out of the first assets that come to his hands as one of the preferential debts mentioned in section 209 of the Companies (Consolidation) Act, 1908, without any limitation to £100.

Accordingly, I give judgment for the full amount claimed by the plaintiff, together with the costs of the action when taxed and ascertained, and I refer such costs to the Taxing Master, to be paid as provided by sections 107 and 209 of the Companies (Consolidation) Act, 1908, and I reserve the further consideration of this action and give liberty to the plaintiff to apply as he may be advised if said amount claimed and said costs are not paid.

Solicitor for the plaintiff: *W. K. Gibson.*

Solicitor for the defendants: *James A. Culbert.*

J. D. C.

[IN THE COURT OF APPEAL.]

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June 18

IN THE MATTER OF THE LOCAL REGISTRATION  
OF TITLE (IRELAND) ACT, 1891, AND OF  
PATRICK LENNON, A REGISTERED OWNER  
OF LAND (1).

(Folio 12845. County Down.)

*Land Registry—Registered land—Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vic., c. 66), sect. 45—Northern Ireland Land Act, 1925 (15 & 16 Geo. 5, c. 34), sect. 30 (1)—Sub-division of a holding.*

The D. Co. C. acquired, in order to lay out, maintain and keep a new road or an improvement of an existing road, the use of a portion of a holding subject to a land purchase annuity, without the consent of the Ministry of Finance.

*Held* by the Court of Appeal (Moore L.C.J., Andrews and Best L.JJ.), affirming the decision of Wilson J., that the D. Co. C. were entitled to have registered under the Act as a burden the use of portion of the holding, as no "sub-division" of the holding within the meaning of section 30 (1) of the Northern Ireland Land Act, 1925, had been effected.

Patrick Lennon, the registered owner of lands subject to a land purchase annuity, granted to the Down County Council liberty to enter part of his lands and "there-through and thereover to excavate, embank, construct, lay out, maintain and keep a new road or an improvement of the existing road and the fences thereof for the service of the public."

The Down County Council applied to the Registrar of Titles to have entered on Folio No. 12845, County Down, the grant of this right. The Ministry of Finance objected "that the registration of such burdens would constitute a sub-division of the holdings concerned within the provisions of the Land Acts." In spite of this objection the easement was registered by the Registrar. The Ministry of Finance appealed from the Registrar's decision to the Land Judge, who being of opinion that the granting of the right was not a sub-division of the lands, and that the registration of the right as a burden on the lands was correct, affirmed the decision of the Registrar. The Ministry of Finance appealed to the Court of Appeal.

(1) Before Moore, L.C.J., Andrews and Best, L.JJ.

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*Babington K.C. (Attorney General), Monroe K.C. (with them Dougherty)* for the Ministry of Finance :—

The folio is the conclusive record of the position.

[MOORE L.C.J. referred to *In re Geoghegan* (1).]

If the use of land can be acquired in this way, the power of sale is rendered nugatory. The Ministry of Finance are entitled to prevent a void burden being placed on the register. The Ministry of Finance are much more effected than they would be by any ordinary sub-division. An easement can only be attached to a dominant tenement. *Rangeley v. Midland Railway Company* (2), at p. 310. The Ministry wishes to assert its right in order to establish its security. We submit that the words in the grant “for the service of the public” constitute a dedication to the public. We rely on the words used by Lord Cairns in *Rangeley v. Midland Railway Co.* (2) at pp. 310-311.

In the present case we submit that there has been a physical sub-division of the holding, having a legal effect. The ownership has been sub-divided, the registered owner having parted with everything except the bare legal ownership. The Down County Council is in control and in occupation. The grant takes away from the owner rights and powers over the land. The result of that instrument is that the occupation has passed, and if the occupation has passed, we submit that there is a sub-division of the holding. The grant conveys more than an easement.

Section 30 of the Northern Ireland Land Act, 1925, was put in to enable the Land Commission to secure their annuity. There is a dedication to the public in perpetuity, and the Land Commission would have to sell subject to that dedication. In fact, and in law, there has been a sub-division of the holding. Sub-division means either parting with the physical possession of the land itself or parting with the physical possession plus the title. There can be a sub-division although the title to the estate has not passed.

*Murphy K.C., Megaw K.C. (with them J. D. Chambers)* for the Down County Council :—

This was a proper subject of registration. Section 47 of the Local Registration of Title Act, 1891, shows what are

considered to be burdens, amongst these are rights of the public or any class of the public. Then Order 4 r. 20 of the Land Registry Orders and Rules provides that "It shall be competent for the registrar to register as burdens affecting registered land, such matters as, in addition to the burdens specified in section 45 of the Act of 1891 may appear to him properly to charge or affect the registered land."

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It was recognised in *Harrison v. Duke of Rutland* (1) that all that the grant of a right of way passed to the public was a right of passing and re-passing. Here, it is admitted that no estate has passed. The present case does not differ from the creation of a private right of way. Sub-division is something obviously distinct from sub-letting. This is not a sub-division. The Registrar has correctly and properly registered this instrument.

MOORE, L.C.J. : This really is a case between two public departments, the Ministry of Finance and the Down County Council. The Council for public purposes have acquired the use of a portion of a holding subject to a land purchase annuity. I suppose there is a sum of about £60 payable by instalments advanced out of public moneys payable by annual instalments still due in respect of which the Ministry are the trustees to collect.

The Down County Council have acquired permission to use this portion for a public road and have spent a considerable sum upon it.

They have evidently found the control of the Ministry irksome as may be inferred from the affidavits, and have devised a method whereby they considered they could avert interference by that Ministry.

The Ministry has power under section 54 of the Act of 1903 to put up for sale a holding subject to a purchase annuity where the holding has been sub-divided.

It has been decided in *In re Geoghegan* (2) that where there is sub-division the Ministry are not affected and are in no way bound. By the Northern Ireland Land Act, 1925, section 30, all such division is absolutely void.

Why therefore the Ministry should object to registration of an instrument which they say is sub-division, but which cannot affect them, I do not understand.

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But at any rate it is conceded in the present case that unless the holding has been "sub-divided" within the meaning of the statute the appeal fails.

In my opinion, giving the words the best consideration that I can, sub-division of the holding means a parting with the title to possession of part of the holding in such a way that an estate of some nature in the lands is thereby assigned or conveyed. I do not think that parting with a mere right of occupation over part of the land, the title to the land itself remaining in the legal possession of the owner, is such sub-division.

I think the appeal should be dismissed with costs.

ANDREWS, L.J. : The objection is raised in the present case by the Ministry of Finance to the registration of a right granted to the County Council of Down by an instrument, dated 29th December, 1927, and therein expressed to be a right to enter certain lands and "thereover to excavate, embank, construct, lay out, maintain and keep a new road or an improvement of the existing road and the fences thereof for the service of the public." The ground of the objection is that the instrument is alleged to effect a sub-division of the holding, and so cannot legally be registered without the consent of the Ministry of Finance, who are in receipt of the Land Purchase Annuity payable in respect of the lands comprised in the Folio. In my opinion the instrument does not effect any sub-division; it merely creates a burden which may properly be registered under the Local Registration of Title (Ireland) Act, 1891, section 45. By sub-section (j) "Any easement, profit à prendre, or mining right created by express grant or reservation after the first registration of the land," may be registered as a burden affecting registered land. I agree with Mr. Monroe that the right which is conferred by this instrument is, strictly speaking, something more than a mere easement, for there cannot be an easement in gross, and there is no dominant tenement here to which any such easement could be attached. However whilst I am not disposed to hold that the right conferred is an easement, I agree with the view expressed in Halsbury, vol. 16, p. 49, that the right of the public is in the nature of an easement, as all that is granted is a right to pass and repass. The estate in the lands and the

property in the soil still remains vested in the registered owner. See judgment of Lord Esher in *Harrison v. Duke of Rutland* (1). In these circumstances it is important to refer to section 45, sub-section (m), which enables "any such other matter as may be prescribed" to be registered as a burden affecting registered land. Order IV, r. 20, of the Land Registry of Ireland, provides that "it shall be competent for the registrar to register as burdens affecting registered land, such matters as in addition to the burdens specified in section 45 of the Act of 1891, may appear to him properly to charge or affect the registered land." That rule seems to me to constitute the registrar the tribunal to determine whether any matter not falling strictly within the other provisions of section 45 may be registered as a burden, the criterion for such registration being that it should appear to the registrar properly to charge or affect the registered land. The registrar has held, and in my opinion has properly held, that the right conferred in the present case creates a burden which charges or affects the registered land. The instrument was drawn with the avowed and perfectly legitimate object of merely creating such a burden, so as to avoid such a sub-division as would have been effected by the transfer of an estate in the lands.

In my opinion the appeal must be dismissed with costs.

BEST, L.J. : This appeal must fail, unless this was a sub-division. I cannot agree with the able and ingenious argument of Mr. Monroe that a physical sub-division must have taken place, and that a legal sub-division was made.

I have come to the same conclusion as has been indicated by my colleagues.

The appeal must be dismissed with costs.

Solicitor for the Ministry of Finance : *J. H. B. Gunning.*

Solicitor for the Down County Council : *Robert J. Dickson.*

J. McC.

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1926.

## ESTATE OF BERESFORD-ASH (1).

June, 22.  
July, 13

(N.I. 250.)

*Land purchase—Vesting of holding in Land Purchase Commission—Turbary—Right of Commission to make regulations—Rights of vendor—Compensation—Land Law (Ireland) Act, 1881 (44 & 45 Vict., c. 49), s. 5—Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), s. 34—Irish Land Act, 1903 (3 Edw. 7, c. 37), s. 21—Northern Ireland Land Act, 1925 (15 & 16 Geo. 5, c. 34), s. 26.*

The estate of A. vested in the Land Purchase Commission by virtue of the Northern Ireland Land Act, 1925. At the date of such vesting the holding of W. C. on the estate was held under a judicial agreement which contained a provision giving the tenant the right to take such turf on his holding as might be required for its use. Prior to the vesting, the vendor and his predecessors had exercised their rights under section 5, sub-s. 5 the Land Law (Ireland) Act, 1881, and in doing so, had been accustomed to make annual lettings of turbary on the holding to tenants and others, charging payments therefor.

When the estate vested the Commission made draft regulations, with respect to the turbary on the holding, pursuant to section 21 of the Irish Land Act, 1903, and section 26 of the Northern Ireland Land Act, 1925. These draft regulations provided for the payment of the turbary rents to W. C.

The vendor objected to the regulations made by the Commission on the ground that his former rights over the bog were infringed and no compensation awarded to him in respect thereof. The matter was referred to the Judicial Commissioner.

*Held* (by Megaw K.C., Judicial Commissioner) that the regulations affecting the turbary should provide for compensation to the vendor and that, in assessing such compensation, regard should be had to the pre-existing rights of the vendor and the proprietor of the holding.

MEMORANDUM and questions of law referred for the decision of the Judicial Commissioner.

The holding of William Carlin on the estate of William R. H. Beresford-Ash was included in the Final List.

The 15th July, 1927, was fixed as the appointed day and on that date the holding was vested in the Land Purchase Commission, Northern Ireland. At the date of vesting the holding was held under a judicial agreement dated 18th March, 1897, which contained a provision for

(1) In the Court of the Land Purchase Commission before  
Megaw K.C., Judicial Commissioner,

the tenant "getting turbary as heretofore." This provision referred to the tenant's right to take such turf on his holding as might be required for its use, which right had been enjoyed by the tenant from the date on which the said holding was first held for a statutory term, that is pursuant to agreement and declaration filed on 21st April, 1882.

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Until the appointed day above mentioned the vendor and his predecessors have had in respect of the said holding all the rights of entering upon the said holding for turbary and of cutting and taking turf therefrom as are reserved or given by section 5, sub-s. 5 of the Land Law (Ireland) Act, 1881, to the landlord of a holding subject to a statutory term.

In exercise of these rights the vendor and his predecessors have been accustomed for many years to make annual lettings of turbary on this holding to tenants and others charging payment therefor and at the time of inspection of the holding by the Commission prior to the vesting 16 tenants were paying a rent of 2/6 each and one tenant a rent of £1 to the vendor for such turbary lettings.

There is more turf on the said holding than is needed for the use of the holding and accordingly pursuant to the provisions of section 21 of the Irish Land Act, 1903, and section 26 of the Northern Ireland Land Act, 1925, the Commission on 29th March, 1928, made draft regulations with respect to the turbary on the bog on the said holding. These draft regulations herewith incorporated provided for the payment of the turbary rents to William Carlin, the purchasing tenant, and did not provide for any payment to the vendor.

The vendor has objected to the draft regulations on the ground that his said rights of turbary as heretofore exercised by making annual lettings of turbary on the bog are infringed and that no payment or compensation is awarded to him under the regulations.

#### QUESTIONS OF LAW.

1. Are the said turbary rights of the vendor affected by the vesting of the holding in the Land Purchase Commission, Northern Ireland?

2. Can the vendor still make lettings of the unexhausted turbary on the holding?

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3. Has the Commission power to bring into operation the said draft regulations without the consent of the vendor?

4. Has the Commission power to award compensation to the vendor by prescribing annual payments to be made by occupiers cutting or making turf under the provisions of the regulations or by prescribing other payments annual or in gross?

5. Is it an essential of regulations which affect the turbary on this holding that they provide for compensation to the vendor as mentioned in question 4?

6. If the answer to either of questions 4 or 5 is in the affirmative on what principles should the Commission act in assessing the relative compensation to the vendor and to the proprietor of the holding?

*Monroe K.C.*, for the Land Purchase Commission :—

The power to make regulations relating to turbary is conferred on the Commission by section 21 of the Irish Land Act, 1903, and the provisions of this section are extended by section 26 of the Northern Ireland Land Act, 1925. It would appear from the judgment of Fitzgibbon, L.J. in *King-Harman's Estate* (1) that no right of turbary survived to the vendor. *Scott's Estate* (2) also supports this view. Although the matter was not argued as between vendor and tenant, in these two cases, nevertheless the Commissioners were obliged to act in accordance with the decisions.

*Murphy K.C.* and *MacDermott* for the vendor :—

We rely on section 34 of the Land Law (Ireland) Act, 1896. This section preserves the previous existing rights of the vendor to the turbary. In *King-Harman's Estate* (1) and *Scott's Estate* (2) the question of the landlord's rights was not argued and the pronouncements of the judges on the point were obiter dicta.

Even if the Commission is entitled to make these regulations, it does not follow that the vendor's rights under section 5 of the Land Law (Ireland) Act, 1881, are destroyed. We would still be entitled to rely on section 21 of the Irish Land Act, 1903, as extended by section 26 of the Northern Ireland Land Act, 1925. The latter section

enables the Commission to make regulations whether the proprietor of the holding had or had not an exclusive right to turbary. The Commission is not obliged to give over the entire payments made in respect of the turbary to the tenant.

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It was not intended that the Land Acts should result in disappropriation without compensation, but in the present case it is clear that the purchase money, which was calculated with reference to the rent, does not include any compensation in respect of the vendor's former right to turbary.

[William Carlin, the proprietor of the holding, did not appear and was not represented.]

*Cur. ad. vult.*

The Judicial Commissioner, giving judgment, said:—

This matter comes before me on a memorandum to determine certain questions of law arising in the administration of the Northern Ireland Land Act, 1925. The answers to these questions are of far-reaching importance. So far as I know this is the first occasion on which a judicial declaration has been sought in reference to the effect of the 1925 Act respecting turbary rights or the principles to be adopted by the Commission in framing regulations—though under the previous Acts the question has been considered by the Court of Appeal in *King-Harman's Estate* (1) and *Scott's Estate* (2).

July 13.

As has been frequently pointed out, the method of effecting the transfer of property to the tenants under the last Act is widely different from that of the previous Land Purchase Acts. Except in special cases the initiation of transfer under the earlier Acts arose from agreement between the parties and the parties had, within recognised limits, the power of making necessary reservations and the power of agreeing upon the purchase price. Under the scheme of the 1925 Act, transfer of tenanted land is compulsory, reservations of rights possessed by the former owner practically cease to exist, and the price is automatically fixed when the rent and its date of fixing has been ascertained. Though the legislation as to turbary has once

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and again been reviewed in reported decisions on this vexed question, as the Northern Ireland Land Act, 1925, is based on different considerations from nearly all previous legislation I propose to refer to the various statutory provisions affecting turbary right very briefly.

Section 29 of the Landlord and Tenant Act (Ireland), 1860, enacts that in any lease or demise made on or after 1st January, 1861, of lands containing bog or where any lease is made giving a right of turbary on the premises the tenant may cut or use the turf bog so far as necessary for bona fide use of the demised premises, but he may not use the turf for trade or manufacture or sell it unless such a right is expressly given in writing.

Next the Act of 1881, by section 5, sub-s. 5, where a statutory term has been created, provides that the landlord or person authorized by him may upon making amends, etc., enter upon a tenant's holding for the purpose of cutting or taking turf save such as may be required for the use of the holding.

Section 17 of the Act deals with the cutting of turf where a tenant has a profit a prendre attached to his holding in respect of turf over unenclosed lands, and gives the Land Commission a power to restrain the tenant from an improper use of the right.

The Turbary Act, 1891, referred to in the argument, gave the Land Commission power to purchase bogs when an estate was sold for the benefit of the tenants. This Act recognised the existing law and the Land Commission had to be reasonably satisfied that by proper payments from the tenants of the estate the Exchequer would suffer no loss but the purchase money of the bog went to the landlord. By this Act the Commission had power to make regulations to secure the proper reclamation of the soil after the bog was cut out.

Section 9 of the 1896 Act secured that rights of turbary should be an element in fixing a fair rent and provided that the right of turbary should be under control of the Court of the Land Commission and that reasonable regulations of the landlords might be adopted in that Court's Orders.

A new departure was made by the 1903 Act where by section 4 advances might be made by the Land Commission for the purchase of turbary by approved trustees.

Then comes an important section, section 21, which is expressly referred to in the Act of 1925, giving the Land Commission power to make regulations where the tenant purchaser had not an exclusive right of turbary—and this power was to be exercised on such terms as might appear to them to be just, and elaborate conditions were laid down as to the limits within which the Commission were to be kept in framing the regulations.

The effect of this section has been a matter of judicial pronouncement in the Court of Appeal in the cases to which I have already referred.

The decisions seem to me to establish that under the Land Purchase Acts prior to 1925 turbary on a tenant's holding—no matter what the previous rights of the parties were—vested in the tenant, but such vesting was subject to the power and duty of the Land Commission to make regulations under section 21 of the 1903 Act, which, as was established in *Scott's Estate* (1), they might exercise at any time before or after the vesting. Claims in respect of turbary rights existing in others subject to section 34 of the Act of 1896 were transferred to the purchase money by section 16 of the 1903 Act.

It has been strongly argued before me by Mr. Murphy that section 34 of the Land Law (Ireland) Act, 1896, preserves the previous existing rights of a vendor or owner the contrary in *King-Harman's Estate* (2) and *Scott's Estate* (1) were merely obiter dicta and not necessary for the decisions of the cases. Whether the point was argued or not it seems to me that the effect of section 34 was very carefully considered, and I do not see any reason to differ with the conclusions so categorically stated by Ronan L.J. both in *Scott's Estate* (1) and in *Maguire v. Brown* (3). It is not possible for me to say whether the legislature had in mind the decisions on section 34 when enacting the Act of 1925. It does seem as if quasi-easements which might be necessary to an owner for the reasonable enjoyment of untenanted land which he still retains had been overlooked, and one may well apprehend that troublesome situations will from time to time arise in the future in regard to the enjoyment of land remaining in the owner-

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(1) [1916] 1 I.R. 180  
(2) [1908] 1 I.R. 202

(3) [1921] I.R. 148 at p.169

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ship of the landlord after the vesting has been completed. I am obliged therefore to hold that no provision has been made by the application of section 34 of the 1896 Act to protect the previously existing interest of the owner.

This however does not end the case. Under the then operative Acts the Court of Appeal in Scott's case gave some consideration in regard to the principles to be followed in preparing regulations. On this matter there was a difference of opinion among the members of the court—though I do not think that this divergence gives any trouble in the decision of the present case, when one looks at the considerations that underlay the views of the different members of the court. Those who were of opinion that the tenant should get all the advantage of turbary rents adverted to the fact that though section 34 of the 1896 Act did not apply, the landlord would naturally in making his agreement for purchase take this into account in arriving at the purchase money, and that consequently the purchase money would be increased to a corresponding extent.

Under the present enactment the owner has no voice in fixing the purchase money. The process of fixing it is automatic, and by this Act, just as in the earlier Acts when the sale takes place, all claims in regard to turbary are transferred to the purchase money.

Some alteration of the law has been effected by section 26 of the 1925 Act. Previously, the Commission had no power to make regulations when the proprietor had an exclusive right of turbary. This power is now extended. The wording of the Act shows that a distinction is recognised between the cases of a tenant purchaser having an exclusive right to bog, and only a right for the use of his holding. The Land Purchase Commission are to frame regulations "as may appear to them to be just." Could it be contended that it would be just to treat in the same way the tenant who had an exclusive right, and one who had a very restricted right? Are the regulations to be the same? I am clearly of opinion that they should not, and that nothing in the Act compels the Commission to give over any payments that may be made for turbary to the tenant where he had no such right previous to the sale. The privileges of outsiders over a holding acquired under the Act are kept intact by section 34 of the 1896 Act. Obviously no such privileges were at the time of that legis-

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lation required to protect a vendor who could protect himself. The price of the holding then was not only that of the corporeal subject matter of the tenancy held from the landlord but of the rights attached to it. In the present case the rent has been fixed on the basis of the tenant having a right of turbary for the use of his holding. That rent determines the standard price. It is clear therefore that the purchase money does not include anything in respect of the owner's pre-existing rights. In the case under review the purchase money is calculated with reference to a rent which is fixed on the basis of turbary rights belonging to landlord—with a right for the tenant to get turbary as theretofore a court should not hold unless clearly compelled to do so that in any scheme giving rights of turbary, all advantages of the turbary should be transferred to a person who did not own them and did not pay any price for them.

I have had a case brought to my notice where a tenanted holding consisted of an area of 80 acres, of which 70 were virgin bog. The rent of the holding was £3 odd. By issuing bog tickets previous to the operation of the 1925 Act the landlord had a return of about £30 a year from the turbary the ownership of which remained in him prior to the operation of the 1925 Act. It would certainly seem inequitable that for the future by paying an instalment less than his previous rent, the bog rental of the landlord should be transferred to the tenant and regulations in such a case giving turbary rents of £30 a year to the purchasing tenant would seem on their face inequitable and unjust.

The legislature had provided a way by which anomalies of such a nature can be removed. It has entrusted to the Land Purchase Commission the duty of making regulations on just terms. In my opinion the powers granted by section 21 of the Act of 1903 and section 26 of the Act of 1925 are to be exercised in a way that will take into account the previous rights of the parties which are only an element in the determination of the purchase money so far as they have been considered in fixing a fair rent. The considerations mentioned by O'Brien L.C.J., at p. 202 in *Scott's Estate* (1) seem to me to favour the views I have tried to express.

I regard the power to make regulations as an administrative provision conferred upon the Commission by

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statute by which they in the changed state of affairs brought about by the present Act, will be able without doing injustice to anyone to manage and control turbary rights which are so jealously guarded in country districts for the good of the persons who have an interest in them.

Sporting rights were mentioned in Scott's case. At that time in the ordinary course exclusive sporting rights were dealt with by the agreement. Now they would appear to vest in the Land Commission and are subject to regulations, and it might seem arguable that the same considerations should now apply in framing regulations or schemes both as regards turbary rights and sporting rights. It is an equitable jurisdiction given to the Land Commission which should be exercised on equitable terms. I should like, however, to make it clear that I give no decision as to sporting rights.

Perhaps I should add that in making regulations the Land Purchase Commissioners should give full weight not only to the pre-existing rights of all parties in the turbary, they should provide as far as possible facilities for securing these rights by giving where necessary rights of way, they should take care that no unreasonable damage was done to the proprietor of the holding in respect of his other lands, and award proper compensation for any injury that may be done to him—of course, in doing so they should have regard to how far the rights of the owner and turbary tenants were a burden on the holding before it vested in the Commission. There is one matter that is stressed by all the Land Acts where regulations are mentioned to which attention should be given, viz., that nothing should be authorized in any turbary scheme that will interfere with the due reclamation of the holding when turbary has been exhausted.

The questions accordingly should be answered:—1, Yes. 2, No. 3, Yes. 4, Yes. 5, Yes. 6, In assessing compensation they should have regard to the pre-existing rights of the vendor and proprietor of the holding before the appointed day observing the requirements of section 21 of the Land Act, 1903.

Solicitor for the Land Purchase Commission: *J. H. B. Gunning.*

Solicitors for the vendor: *Martin, King, French & Ingram.*

KING'S BENCH DIVISION.

K. B. D.  
1928.COMMISSIONERS OF INLAND REVENUE v.  
BARRIE, LIMITED (1).

July 4.

*Practice—Case stated—Divisional court—Hearing before two judges—Effect of difference of opinion.*

In a case stated by the Recorder of B., where he had over-ruled a determination of the Commissioners of Inland Revenue as to the amount of the deficiency for excess profits duty sustained by Barrie, Limited, during the accounting period ending 30th June, 1921, the sole question for decision was at what date, whether before or after June 30th, 1921, a loss arising out of a certain contract had been sustained.

The court differed, Moore L.C.J. holding that the loss could not be brought as a deduction into the accounting period, and Brown J. holding that it ought to be included in the accounting period.

After argument as to the effect of this division of opinion the court decided to make no order, the result being that the Recorder's decision stood.

CASE STATED by the Recorder of Belfast, for the opinion of the High Court of Justice in Northern Ireland, King's Bench Division, he having over-ruled a determination of the Commissioners of Inland Revenue as to the amount of the deficiency for excess profits duty sustained by the defendants during the accounting period ending 30th June, 1921, the sole question for decision was at what date, before or after June 30th, 1921, a loss arising out of a certain contract should be considered to have been sustained by the defendants.

In June, 1920, by a contract in writing the firm of Martin, Ltd., sold and the defendants purchased 250,000 bags to be delivered from September, 1920, to February, 1921, in six equal monthly deliveries. The defendants took delivery of 35,300 bags on foot of the said contract, but refused to take delivery of the balance of 214,700 bags. The price of the bags under the contract was 9½d per bag, and the market price had fallen in March, 1921, to approximately 3d per bag. This refusal was by letter dated 24th March, 1921, and was in answer to a letter dated 23rd March, 1921, from Martin, Ltd., to the defendants and amounted to a repudiation of the contract by the defendants.

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On 28th April, 1921, Martin, Ltd., issued a writ against the defendants claiming damages for this breach of contract and on 7th June, 1921, served their statement of claim. After negotiations the action was settled on terms on 5th August, 1921, and by consent made a rule of court, on that date. By these terms the defendants agreed to take delivery of the undelivered bags, but at a reduced price. The bags were delivered to the defendants and paid for by them in accordance with the agreed terms. It was agreed between the parties that the net loss incurred was £4,733 5s 2d. The question for decision was whether this loss was "sustained" by the defendants during the accounting period ending 30th June, 1921, or after that period.

The court differed, Moore L.C.J. holding that the loss occurred under the new and substituted agreement of August 4th, 1921, and that this loss could not be brought as a deduction into the accounting period, but Brown J. held that the loss was made or incurred by the repudiation of the contract in March, 1921, and that the Recorder was right in holding that the loss must be included in that accounting period.

The question was then argued as to the effect of the difference of opinion between the two members of the court.

*Murphy K.C.* (with him *Megaw K.C.* and *Black*) for the defendants:—

I submit that the question should be answered by the court so as to leave the order of the Recorder standing. It is stated in "The Annual Practice, 1927," p. 1,226, referring to the practice in divisional courts, that "where there is a difference of opinion between two judges on an appeal from an inferior court the view of the judge who agrees with the judge below will prevail, and the appeal will be dismissed with costs, the former practice was otherwise, the junior judge withdrawing his judgment." In *Poulton v. Moore* (1), which was an appeal from the County Court, the court consisting of two judges differed in opinion, Lush J. as the junior judge withdrew his judgment. Subsequently an application was made to the court to re-

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consider the matter, the order of the court not having been drawn up. In giving judgment upon this application Lush J. said: "When I withdrew my judgment I had a strong impression that recently I had seen a report of a case in the Court of Appeal in which the opinion was expressed that the practice was for the junior judge, when there was a difference of opinion, to withdraw his judgment. I have found reports of that case *Ellis v. Banyard* (1), but in those reports the observation to which I referred is not reported. In the "Daily Telegraph" of the 6th of December, 1911, however, there is a report of that case, which I am satisfied is accurate, according to which Vaughan Williams L.J., referring to the dismissal of an appeal to the divisional court because the two judges differed, stated that under the old common law practice the junior judge withdrew his judgment, and that in such a case the judgment of the senior judge became the judgment of the court. In this case I only withdrew my judgment in accordance with what I believed to be the practice. Mr. Cozens-Hardy cited recent cases which showed that the old practice is not always followed, but as I have already withdrawn my judgment and have found that statement by Vaughan Williams L.J., I think that the better course will be to leave the matter as it stands. I do not say that I disagree with what has been said as to the reasonableness of discontinuing that practice. It seems to me, putting aside altogether the question of practice, that when once a litigant has obtained a judgment in any court that judgment ought to stand, unless the appellate court, unanimously or by a majority, decides that the judgment of the court below was wrong. I hope the matter will soon be reconsidered, because it is very desirable that a uniform practice should be established."

*Poulton v. Moore* (2) went to the Court of Appeal. Phillimore L.J. in his judgment at p. 415 said: "Lush J., with whose views on the main questions I agree, withdrew his judgment and thereby allowed the judgment of the County Court Judge to be reversed by a single judge. I do not express any decided opinion upon the matter, but I must express my doubt as to whether he was right in so doing. The analogy of mandamus was referred to in the court

(1) 106 L.T. 51; 28 T.L.R. 122

(2) [1915] 1 K.B. 400

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below, but it does not follow that the practice on an application for the prerogative writ of mandamus applies to an appeal from a county court. Even, however, if we apply the practice in mandamus there would seem to be no such rule as that suggested."

In *Flannagan v. Shaw* (1) Scrutton L.J. said at p. 107: "In this case Bailhache J. seems to have thought that the judgment of the County Court Judge was right, and yet the appeal was allowed. I regret that this course was taken. It would have been otherwise if the judgment had been affirmed, but as it is it seems to have been over-ruled without the necessary concurrence of two judges of the High Court," and at p. 108 Duke L.J. said: "I share the view of Scrutton L.J. that it was not the intention of the legislature that the judgment of a county court judge should be over-ruled by one judge in the High Court, which seems to have happened in this case."

In *Mitchell v. Egyptian Hotels, Ltd.* (2) an appeal from the Court of Appeal to the House of Lords, the House being equally divided, the decision of the Court of Appeal was affirmed, and in *Smith v. Lion Brewery Company, Limited* (3), where also the House of Lords was equally divided, the decision of the Court of Appeal was affirmed. In *Greene v. Thornton* (4) Fitzgibbon L.J. in his judgment said at p. 396: "The order appealed from purports to be an order of the Queen's Bench Division. It states that the demurrer, 'standing from the 25th February, 1885,' was on the 11th May, 1885, 'called on for judgment, and the Lord Chief Justice and Mr. Justice O'Brien, before whom this case was argued, differing in opinion, and Mr. Justice O'Brien, for the purpose of appeal, withdrawing his judgment, allowing the demurrer, it is ordered that the demurrer be over-ruled.' I must suggest that this course appears inconsistent with the spirit, if not the letter, of the Judicature Act.

"Under the old practice, when in a court of four judges an equal division took place, one withdrew his judgment, and allowed the order to go, on that of the majority of the other three, because otherwise no order could be made, and no appeal could be taken. This course was adopted as

(1) [1920] 3 K.B. 96  
(2) [1915] A.C. 1222

(3) [1911] A.C. 150  
(4) 16 L.R.I. 381

a matter of practice, to give an appeal after the court of first instance had failed to pronounce a decision. But in theory the judge withdrawing thereby ceased to be reckoned a member of the court pronouncing the decision, and the order was that of the remaining members. I respectfully think that this practice ought not to be extended to divisional courts of two members, unless necessity so requires. The Judicature Act, section 45, requires a matter not proper to be heard by a single judge to be heard by a divisional court, constituted by two or more judges, and the leading intention that parties should not be driven to appeal from a common law division until their case had been considered by a court of first instance of more than one judge also incidentally appears from section 33, requiring a divisional court to rehear any order of a single judge as to venue.

The withdrawal of his judgment by one of two judges leaves the order to go with even less authority than that of a single judge, and the more regular course would appear to be to call in a third judge on a further argument before sending the parties to an appeal.

We submit that the practice from the year 1913 onwards should be followed.

*Dougherty* (with him *Babington K.C.* (*Attorney-General*)):—

The fact that this is a case stated distinguishes it from all the authorities that have been cited on behalf of the defendants. A case stated differs from an appeal from an inferior court. The proper course is for the junior judge to withdraw his judgment. A single judge is permitted to sit as a divisional court.

MOORE L.C.J. : The court being equally divided, we make no order.

Solicitor for the plaintiffs : *Solicitor of Inland Revenue*.  
Solicitor for the defendants : *A. S. Merrick*.

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## ESTATE OF OWENS (1).

May 22.  
July 13.

(N.I. 583.)

*Land purchase—Northern Ireland Land Act, 1925 (15 & 16 Geo. 5, c. 34), Sched. III—Annual sum fixed by Land Purchase Commission—Appeal to Judicial Commissioner—Rent reserved by judicial leases—Whether judicial rents.*

The Northern Ireland Land Act, 1925, applied to the estate of O. Four holdings on the estate were the subject of judicial leases, dated 31st December, 1883, sanctioned by section 10 of the Land Law (Ireland) Act, 1881. These holdings were described in the provisional list as being subject to rents other than judicial rents and for the purpose of determining the standard purchase annuities, the Land Purchase Commission fixed annual sums in respect of the holdings under the provisions of Part II of Sched. III to the Northern Ireland Land Act, 1925.

*Held* (by Megaw, K.C., Judicial Commissioner) that the rents reserved by the judicial leases should be regarded as judicial rents and accordingly the standard purchase annuities in respect of the holdings should be fixed under Part I and not under Part II of Sched. III to the Northern Ireland Land Act, 1925.

APPEALS to the Judicial Commissioner from fixing of annual sums by the Commission under part II of sched. III to the Northern Ireland Land Act, 1925.

The estate of Samuel Shannon Owens was about to become vested in the Land Purchase Commission, Northern Ireland, under the provisions of the Northern Ireland Land Act, 1925. Four holdings on the estate which were the subject of judicial leases, each dated 31st December, 1883, and made under section 10 of the Land Law (Ireland) Act, 1881, were described in the provisional list as being subject to rents other than judicial rents. For the purpose of determining the standard purchase annuities in respect of these holdings the Land Purchase Commission fixed annual sums under part II of sched. III of the Northern Ireland Land Act, 1925. The owner appealed to the Judicial Commissioner.

*MacDermott* for the owner :—

The holdings are wrongly described in the provisional list as being subject to rents other than judicial rents. I

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submit that the rents in these cases should be regarded as first term rents and should be dealt with as such under part I of sched. III to the Northern Ireland Land Act, 1925. This being so, the Commission have no power to fix annual sums in respect of the holdings.

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The expression "judicial rent" is defined by section 48 of the Land Law (Ireland) Act, 1896, as a fair rent whether fixed by the court or by agreement or by arbitration. Having regard to this definition the rents in the present cases must be regarded as fair rents and as having been fixed by the court.

*Porter* for the tenants :—

The holdings are described in the provisional list as being subject to rents other than judicial rents and accordingly the owner's proper course was to object to the provisional list within the prescribed time and in the appropriate manner. Having failed to do this the present point is not open to him. I submit that the annual sums have rightly been fixed and upon proper principles. It is clear from the headings to the columns in the table in sched. III to the Act of 1925 that the legislature intended that the provisions of part I of the schedule should be confined to first, second and third term judicial rents. Rents reserved by judicial leases are quite different from such rents. No case has been cited in which a rent has been regarded as a judicial rent merely because it was reserved by a judicial lease.

*MacDermott* (in reply) :—

It would not have been competent for the owner to have objected to the provisional list for the purpose of raising the point which I have made. Objections to the provisional list can only relate to inclusion or non-inclusion of land therein : *Estate of Rowan Hamilton* (1).

*Cur. ad. vult.*

The Judicial Commissioner, giving judgment, said :—As July 13 regards four of the holdings in this estate Regd. Nos. 1, 2, 4 and 5 the point has been raised that they are wrongly

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described in the provisional list as being subject to rents other than judicial rents and that consequently they do not come within part II of the third schedule of the Northern Ireland Land Act, 1925, and that consequently the Land Purchase Commission have no power to fix an annual sum under that part of the schedule.

Mr. Porter countered this preliminary point with another, viz., that having regard to the note appearing on the provisional list the objection had not been taken within the prescribed time. I over-ruled this as the descriptions given in the provisional list in regard to whether holdings are held on judicial or non-judicial rents are not statutory, and are not required to be stated on the provisional lists by rules. It would seem to follow therefore that the objection made by Mr. MacDermott was not shut out by the statute or any of the existing rules.

The holdings are the subject of a statutory but very unusual tenure, viz., judicial leases sanctioned by section 10 of the Land Law (Ireland) Act, 1881. The procedure under which such leases are authorised will be found referred to in the notes to section 10 in Cherry's Land Acts. These leases were all made on 31st December, 1883, and the term of the cause in each case is to commence on 1st November, 1881.

Mr. MacDermott, on behalf of the owner, has contended that the rents so fixed are judicial rents and, for the purposes of fixing the standard purchase annuity, fall under the category "first term judicial rents."

He has referred me to the definition in section 48 of the Act of 1896.

[The Judicial Commissioner read the definition in this section.]

The rent in cases of judicial leases has got to be fixed in the course of a judicial procedure, and there is a great deal of force in the argument that *prima facie* a judicial lease at a rent means a judicial rent. In the Act of 1925, schedule III, it is the date at which the rent was fixed by the court, or fixed by an agreement between the parties filed in the court. The legislature recognised that whether from variations in prices of farm produce or for some other reason rents were fixed on different standards at different periods and has tried in this Act to meet any inequality that may have been caused thereby.

In my opinion Mr. MacDermott's argument was well founded, and so far as these holdings are concerned the standard purchase annuity should be fixed under part I of the third schedule, and not under part II, and the rents should be treated as first term judicial rents.

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Solicitors for the owner : *R. & H. Orr.*

Solicitors for the tenants : *J. K. Currie & Son.*

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the assets of the company. W.G. brought an action against J.M. and H.S. claiming to be paid in full the lump sum for which his weekly payments could have been redeemed, if the employer had made application for that purpose under the First Schedule to the Workmen's Compensation Act, 1906, equally with the other debts mentioned in section 209 of the Companies (Consolidation) Act, 1908, and in priority to all other debts, out of any assets coming into the hands of J.M. and H.S. *Held* (by Wilson J.) that the workman was entitled to the whole of the amount due to him for compensation as a preferential debt without any limitation to £100 as mentioned in section 5, sub-s. 3, of the Workmen's Compensation Act, 1906, the liability for such compensation having accrued before the receivers were appointed or took over possession of the assets of the Company, and whether or not the accident occurred before 1st January, 1924 (i.e. the date on which the Workmen's Compensation Act (Northern Ireland), 1923, came into operation. *Graham v. Maskell and Smylie*.

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COMPANY (2)—SALE OF PROPERTY—*Dividends out of proceeds—Capital or income—Tenant for life and remainder man*. A testator provided that his trustees might sell his business property and goodwill to a limited company formed to continue and take over his business in consideration of cash and fully paid shares in the company and partly in cash, but so that the shares should not exceed £10,000 in nominal value. After the testator's death the business was converted into a limited company with a capital of £10,000, divided into 500 ordinary shares of £20 each, which at the time of the action were held by the plaintiffs as trustees of his will upon trust for K for life with remainder

to B for life with remainders over. In February, 1925, the directors with the approval of K accepted a proposal for purchase of the concern for £35,000, and the sale was duly completed. The company by resolution on 7th October, 1926, declared the sum of £33,201 (which included the amounts realized for the entire business premises and machinery) to be net profits available for dividend, and resolved that a dividend of £330 per cent. free of income tax should be paid thereon. *Held*, by Wilson J., that in as much as the whole operations of the company from 1st January, 1925, were realization and liquidation and not trading nor carrying on of the business authorized by the Memorandum of Association, the dividend of £330 per cent. payable to the plaintiffs as trustees of the settlement created by the will of the deceased, should be held and applied by them as capital and not as income. A limited company cannot realize its entire assets and, having set aside an amount equal to its nominal capital and discharged its liabilities, divide the surplus as income or profits under the guise of declaring a dividend: to do so would be a fraud upon the winding up provisions of the Companies Act, 1908. *Gihon d., Davison v. King*.

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COUNTY COURT HOUSE—OWNERSHIP OF—*Liability of County Council to repair—Towns Improvement Clauses Act 1847 (10 and 11 Vict., cap. 34) s. 75 Memorandum of order in petty sessions book—Subsequent full order shewing jurisdiction validly made*. The Surveyor of O. Urban District Council pursuant to section 75 of the Towns Improvement Clauses Act, 1847, gave notice to the county council of T. requiring them to take down, rebuild and repair the wall and railings of the county court house. The county council did not comply with this notice whereupon the surveyor issued a summons, which was heard before the justices, who made an order which, as it appeared in the petty sessions book, ordered the county council within four months to take down, rebuild and repair portion of the wall and railings of the O. County Court House. *Held* that the county council were "owners" of the county court house within section 1 of the Towns Improvement Act, 1854, although control of the court house for administrative purposes vested in the high sheriff. *Held* further that words "take down, rebuild, and repair to the satisfaction of T. H." did not involve an ambiguity so as to render the justices order bad for uncertainty. And *Held* that, although the justices order was made at petty sessions and entered in the petty sessions book, the order, not being made under the Petty Sessions Act but under a separate code, the entry in the order book was merely a memorandum and that there was power in the justices to draw up subsequently a full order shewing jurisdiction on its face. *Rex (Tyrone County Council) v. Tyrone JJ.*

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**DIVORCE—DOMICIL—JURISDICTION—**  
*Power to elect between Northern Ireland and Irish Free State.* In a petition by the husband for divorce, on the ground of his wife's adultery, it appeared that at the date of the marriage the domicile of the husband was Irish and the domicile of the wife English. The marriage took place in Ceylon. The husband was born in part of Ireland which afterwards became the Irish Free State. The husband's father lived in various parts of Ireland, sometimes in what is now Northern Ireland, and sometimes in what is now the Irish Free State. The husband obtained a position in the Ceylon Civil Service in the year 1912 and had ever since resided there, except for periods of leave. There was one son issue of the marriage. The husband's father had lived in the Irish Free State until the year 1925, when he came to live in Northern Ireland, and purchaser a house there. This house was purchased with the object of providing a home which should be available for himself and his son. *Held* by Moore L.C.J. that the plaintiff could elect either to be domiciled in Northern Ireland or in the Free State, and that the petitioner having elected to be domiciled in Northern Ireland, the court had power to entertain the petition. *In re Egan.*

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**INSURANCE—FIRE POLICY—**  
 NONDISCLOSURE BY INSURED OF MATERIAL FACTS—*Principal and agent—Condition in policy as to disclosure—Knowledge of agent acquired prior to agency not imputable to principal.* L. B. & Co., agents of defendants, who had no express power to do so, appointed R. M. as their local agent in Armagh district, but did not inform the defendants, who neither approved of nor ratified this appointment. M. in October, 1925, sent to L. B. & Co., particulars of a proposed insurance against fire for the plaintiff on his

dwelling house, and a policy for £1,550 was issued by defendants to plaintiff. This policy provided that if there was any misrepresentation as to any fact material to be known for estimating the risk or any omission to state such fact the defendants should not be liable. The plaintiff did not disclose the fact that his house had been burnt down in 1922 and that the C. Company had paid him £1,558 in respect of that loss. The plaintiff's house was burnt on 25th December, 1925, and the loss was notified to defendants by the plaintiff on 26th December, and a claim for £729 10s 0d was made on foot of the policy. The defendants disclaimed liability on the ground that the plaintiff contrary to his common law duty and to the condition of the policy, had omitted to disclose the fact of the previous fire. In an action on the policy tried before the Lord Chief Justice and a special jury the jury found (1) that in respect of the policy M. was acting as agent for L. B. & Co. in the Armagh district; (2) that L. B. & Co. were agents for the defendants to the knowledge of M.; (3) that the defendants after the fire were aware that L. B. & Co. were employing district agents in Armagh district; (4) that it was reasonably necessary to get business for L. B. & Co. to employ district agents in Armagh; and that the defendants should have been aware before the fire that L. B. & Co. were employing such district agents. Upon motion by the plaintiff and cross motion by the defendants for judgment on these findings, the Court of Appeal (Andrews and Best L.JJ.) *held* that the defendants were entitled to judgment on the ground that M. was not their agent; that M.'s knowledge of the earlier fire whenever acquired could not be imputed to the defendants, and accordingly that the plaintiff had concealed a material fact and thereby relieved the defendants from all liability under the policy. *Held*, also that even if M. was the defendants' agent his knowledge acquired prior to his appointment as agent could not be imputed to the defendants. *O'Keefe v. London and Edinburgh Insurance Co., Ltd.*

[APP. 85]

**JUDGMENT—PRIORITY—JUDGMENT MORTGAGE—***Operation of judgment mortgage—13 & 14 Vic., c. 29, sec. 7—Destruction of Judgments Registry—*

*Maxim, Omnia praesumuntur rite esse acta.* On the ruling of the final schedule of incumbrances affecting lands comprised in the estate which was insolvent as to capital, several owners of judgments which had been entered up between Michaelmas term, 1823, and Trinity term, 1831, and prior to 3 and 4 Vict., c. 105, claimed priority to a judgment mortgage registered on 29th June, 1860, although primary evidence of compliance with the Act of Parliament requiring re-registration within five years prior to the registration of the judgment mortgage, was rendered impossible by the destruction of the Registry of Judgments in the year 1922. *Wilson J.* held that the principle of the decision in *Eyre v. Macdowell* (9 H.L. Cas 619) applied and that the judgment mortgage did not obtain priority over a judgment registered under the statute 3 and 4 Vict., c. 105, but not re-registered within five years next before the registration of the judgment mortgage, and also held that in the absence of primary evidence the maxim omnia praesumuntur rite esse acta should be applied, and declared the judgments entitled to priority over the judgment mortgage. *Reid and Curry, Owners; Sir F. H. Miller and Usher-Smith, Petitioners.*

[LAND JUDGE 151]

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JUDGMENT was, on a motion for a new trial, entered for the party, in whose favour the jury should have found ... 19  
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LAND PURCHASE (1)—TURBARY REGULATIONS—*Vesting of holding in Land Purchase Commission—Rights of vendor—Compensation—Land Law (Ireland) Act, 1881 (44 & 45 Vict., c. 49), s. 5—Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), s. 34—Irish Land Act, 1903 (3 Edw. 7, c. 37), s. 21—Northern Ireland Land Act, 1925 (15 & 16 Geo. 5, c. 34), s. 26.* The

estate of A. vested in the Land Purchase Commission by virtue of the Northern Ireland Land Act, 1925. At the date of such vesting the holding of W.C. on the estate was held under a judicial agreement which contained a provision giving the tenant the right to take such turf on his holding as might be required for its use. Prior to the vesting, the vendor and his predecessors had exercised their rights under section 5, sub-s. 5 the Land Law (Ireland) Act, 1881, and in doing so, had been accustomed to make annual lettings of turbary on the holding to tenants and others, charging payments therefor. When the estate vested the Commission made draft regulations, with respect to the turbary on the holding, pursuant to section 21 of the Irish Land Act, 1903, and section 26 of the Northern Ireland Land Act, 1925. These draft regulations provided for the payment of the turbary rents to W.C. The vendor objected to the regulations made by the Commission on the ground that his former rights over the bog were infringed and no compensation awarded to him in respect thereof. The matter was referred to the Judicial Commissioner. *Held* (by Megaw K.C., Judicial Commissioner) that the regulations affecting the turbary should provide for compensation to the vendor and that, in assessing such compensation, regard should be had to the pre-existing rights of the vendor and the proprietor of the holding. *Estate of Beresford-Ash.*

[JUD. COM. 200]

LAND PURCHASE (2)—STANDARD PURCHASE ANNUITIES—*Northern Ireland Land Act, 1925 (15 & 16 Geo. 5, c. 34), Sched. III—Rent reserved by judicial leases—Whether judicial rents.* The Northern Ireland Land Act, 1925, applied to the estate of O. Four holdings on the estate were the subject of judicial leases, dated 31st December, 1883, sanctioned by section 10 of the Land Law (Ireland) Act, 1881. These holdings were described in the provisional list as being subject to rents other than judicial rents and for the purpose of determining the standard purchase annuities, the Land Purchase Commission fixed annual sums in respect of the holdings under the provisions of Part II of Sched. III to the Northern Ireland Land Act, 1925. *Held* (by Megaw, K.C., Judicial Commissioner) that the rents reserved by the judicial leases should

be regarded as judicial rents and accordingly the standard purchase annuities in respect of the holdings should be fixed under Part I and not under Part II of Sched. III to the Northern Ireland Land Act, 1925. *Owen's Estate*.

[JUD. COM. 214]

**LAND REGISTRY (1)—CONSOLIDATION OF HOLDINGS—***Order of Ministry of Finance for consolidation—Personal representative of owner—Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict., c. 66), s. 84 (3); Northern Ireland Land Act, 1925 (15 & 16 Geo. 5, c. 34), s. 30 (3).* J. S., a registered owner of lands, died intestate, and administration was granted to H. R. S. (the applicant). The deceased died possessed of two registered holdings, folios 641 and 642 Co. Armagh. In 1926 the applicant agreed to sell a portion of 641, marked B, to J. M'C. and a portion of 642, marked B, to S. M. As these proposed sales involved a sub-division of each holding, the applicant applied to the Ministry of Finance for permission to sub-divide. Consent was given by the Ministry on the condition that plot "A" of 642 should be consolidated with plot "A" of 641. The Ministry made two orders for apportionment and consolidation, one in respect of each holding. The proprietor named in the orders was the applicant H. R. S., as personal representative of the deceased. In order to meet objections made by the Land Registry the Ministry of Finance cancelled the orders already made and made two new orders, in which the registered proprietor was described as J. S., deceased, in order that the personal representative might be able to carry out the necessary requirements. The Land Registry refused to accept these orders unless the consolidation clauses were omitted, on the ground that having regard to *In re Fitzmaurice's Estate* ([1918] 1 U.R. 33) the consolidations effected were not within the terms of sections 30 (3) of the Northern Ireland Land Act, 1925 (15 & 16 Geo. 5, c. 34). The applicant appealed from the order made by the Land Registry. *Held* by Wilson J. that the Ministry of Finance had power to make the order for consolidation on the consent of the personal representatives of the deceased owner under section 84 (3) of the Local Registration of Title (Ireland) Act, 1891. The order of the

Registrar of the Land Registry was discharged, and it was ordered that the consolidation contained in the order made by the Ministry be entered on the Register. *In the Matter of the Local Registration of Title (Ireland) Act, 1891, and of Joseph Stevenson, Deceased.*

[LAND JUDGE 135]

**LAND REGISTRY (2)—SUB-DIVISION OF HOLDING—PORTION OF HOLDING ACQUIRED FOR ROAD—***Registered land—Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vic., c. 66) sect. 45—Northern Ireland Land Act, 1925 (15 & 16 Geo. 5, c. 34), sect. 30 (1).* The D.Co.C. acquired, in order to lay out, maintain and keep a new road or an improvement of an existing road, the use of a portion of a holding subject to a land purchase annuity, without the consent of the Ministry of Finance. *Held* by the Court of Appeal (Moore L.C.J., Andrews and Best L.J.J.), affirming the decision of Wilson J., that the D.Co.C. were entitled to have registered under the Act as a burden the use of portion of the holding, as no "subdivision" of the holding within the meaning of section 30 (1) of the Northern Ireland Land Act, 1925, had been effected. *In re Lennon.* [C.A. 195]

**LANDLORD AND TENANT (1)—RECOVERY OF POSSESSION—***Notice to quit—Tenant holding over—Statutory tenant—Right of statutory tenant's executors to retain possession—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12 (1) (f).* The plaintiff was the owner of a dwelling-house subject to the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The defendants were the executors of E. W., who at the time of her death held the house as a weekly tenant. In 1920 a valid notice to quit was served on the tenant, and after it had expired the tenant remained on in possession, by virtue of the provisions of the Act of 1920. About two years before her death the defendants came to live in the house with the tenant at her request. Neither of the defendants was in any way related to the tenant, and they were at no time sub-tenants. Afterwards defendants requested the plaintiff's agent to transfer the tenancy to them, but this request was refused. The tenant died on 13th December, 1926, having by her will ap-

pointed the defendants as her executors. The defendants were the only beneficiaries named in the will, which did not specifically dispose of any interest in the house. After the death of the tenant the defendants continued to reside in the house. The landlord instituted ejectment proceedings against both defendants, who claimed the protection of the Increase of Rent Restrictions Acts. Section 12 (1) (f) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides that the expression tenant includes "any person from time to time deriving title under the original tenant." *Held*, by the Court of Appeal (Moore L.C.J. and Andrews L.J.) that the tenant's rights under the Act were altogether personal, and that no interest in her tenancy could devolve on the defendants as her executors. *Keves v. Dean* [1924] 1 K.B. 685 followed. *Drury v. Johnston*.

[APP. 25]

**LANDLORD AND TENANT (2)**—**REMARriage of widow of statutory tenant who had died intestate—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12, sub-s. 1 (g).** The plaintiff was the owner of a dwelling-house subject to the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The premises had been let as a weekly tenancy in or about the year 1923 to J.M'N., who was then in the plaintiff's employment, at the rent of 5s per week. J.M'N. died intestate in June, 1926, leaving the defendant, his widow (who up to the time of his death resided with him). On the death of her husband the defendant remained in occupation and entered into legal possession of the house under section 12 (1) (g) of the Increase of Rent, Etc. (Restrictions) Act, 1920. The defendant married again in March, 1928, and her second husband and his children came to reside in the house occupied by her. The landlord instituted ejectment proceedings against the defendant, who claimed the protection of the Increase of Rent and Mortgage (Restrictions) Acts. Section 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides that "the expression tenant includes the widow of a tenant dying intestate who was residing with him at the time of his death." *Held* by the Court of Appeal (Moore L.C.J. and Best L.J.) that the

widow acquired a vested interest as tenant, and there was nothing in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which divested this interest on her second marriage. *Apsley v. Barr*.

[C.A. 183]

**LUNACY JURISDICTION**—"ORDINARILY RESIDENT"—*Land Purchase (Northern Ireland) Order, 1923, section 8 (2).* S., a person of unsound mind, had lived abroad for a great number of years. In May, 1922, he was by order of the Lord Chief Justice of Ireland brought from abroad and placed in a private asylum near Dublin. His domicile is in Northern Ireland, and he has a family residence in County Tyrone. There was no evidence that S. had ever previously lived in the Irish Free State. Funds, the proceeds of sale through the Irish Land Commission of portion of the estates to which S. was entitled as tenant in tail in possession, were, by orders made between 1912 and 1922, duly vested in the Public Trustee Ireland, appointed under section 52 (10) of the Irish Land Act, 1903, trustee of the settlement made by the will, dated 24th December, 1850, of T. S., deceased. By Order in Council, dated May 25th, 1923, the Land Purchase Commission, Northern Ireland, was established, and the office of Land Purchase Trustee for Northern Ireland was created. In purported pursuance of the provisions of that order the Public Trustee Ireland transferred to the Land Purchase Trustee for Northern Ireland the funds in his name subject to the trusts of the settlement. Section 8 (2) of this Order provides that where the Public Trustee for Ireland was on 31st March, 1923, trustee of a settlement of land in Northern Ireland, his interest in the funds represented by the sale of such lands should be transferred to the Land Purchase Trustee for Northern Ireland, except when the income of the investment on that date was payable to a person "ordinarily resident" in the Irish Free State. On an application made on behalf of the Committee of S. and the Public Trustee Ireland for an order that the Land Purchase Trustee for Northern Ireland should transfer and pay to the Public Trustee Ireland all funds under his control which form part of the estates of S. The Northern Ireland Public Trustee declined to transfer the fund without the sanction of the court

under rule 26 of the Public Trustee Rules, 1904. Andrews L.J., sitting as Judicial Commissioner, refused his sanction to the transfer. *Held* by the Court of Appeal (Moore L.C.J. and Best L.J.), affirming the decision of Andrews L.J., sitting as Judicial Commissioner, that on the day of transfer S. was not "ordinarily resident" in the Irish Free State, and that the application must be refused. In *Re Murtha* (44 I.L.T.R. 114) and *R.* on alleged lunatic 46 I.L.T.R. 220 approved and followed. *S. Estate*. [App. 46]

**NEGLIGENCE (1)**—Costs payable by plaintiff to successful defendant ordered to be added to costs recoverable by plaintiff from unsuccessful defendant. M'G. sued K. and also H. and M. for negligence in driving a motor car in which H. was driving and M. the owner was also travelling. K. was driving another motor car. The two cars collided. At the trial the real issue was whether or not K. and H. and M. were jointly to blame, or if not jointly was any of them separately culpable. The jury found for M'G. as against H. and M., and also that H. was the servant of M., and awarded £25 damages. Moore L.C.J. gave judgment for M'G. for £25 damages and costs as against H. and M., and also entered judgment for K. with costs against M'G. On application it was ordered, following the form of order in *Henderson v. Martin and Barron* (1926, No. 4870), *Brown J.* (unreported) and *Blakely v. Tinsley and M'Causland* (1921, No. 262), *Wilson J.* (unreported), that the costs paid by M'G. to the successful defendant K. should be included in the costs recoverable by M'G. against H. and M. On appeal taken by leave, the Court of Appeal affirmed the judgment of Moore L.C.J. *M'Gucken v. Kennedy, Hamilton and Morgan*. [App. 54]

**NEGLIGENCE (2)**—DEFECTIVE PREMISES—Premises sub-let in apartments—Accident arising from defect—Personal injury to invitee of sub-tenant—Non-liability of landlord—Rent and Mortgage Interest Restrictions Act (N.I.), 1925, 15 & 16 Geo. 5, c. 12, s. 8 (4). Premises the property of the defendant were let to W., who in turn let different portions in apartments to sub-tenants, including the upstairs room to D. The letting to W. was within the provisions of the Rent and

Mortgage Interest Restrictions Act, N.I. 1925. Plaintiff, a district nurse, received a professional call to visit D. The plaintiff proceeded upstairs without mishap, but on descending, and whilst she took the last step on to the hall, the floor gave way and plaintiff received serious injuries in respect of which she obtained a decree for £100 damages from the Recorder of Londonderry. On appeal to the Londonderry City Assizes it was *Held* by Andrews L.J., reversing the decree, that the plaintiff could not succeed in contract on the statutory obligation to repair implied in the letting, as she was in no way party or privy to such letting; and further that she could not succeed in tort as the defendant owed no duty to the plaintiff, who was neither the defendant's invitee nor licensee and had not control of the premises, which was essential to the existence of liability. *O'Reilly v. Doherty*.

[ANDREWS L.J. 32]

**NEGLIGENCE (3)**—MOTOR CAR DRIVEN BY SON OF OWNER—Non-liability of owner—Master and servant—Agency. The plaintiff, whilst riding his motor cycle, collided with the defendant's motor car, which was driven by J., a son of the defendant. As a result of the collision the plaintiff sustained serious injuries. The plaintiff sued to recover damages in respect of personal injuries and damage to his motor cycle caused by the negligence of the defendant, her agent or servant, in the control and management of the defendant's motor car. In answers to interrogatories the defendant admitted that she was the registered owner of the motor car; that her son C. and her daughter H. were licensed drivers; that she had purchased the car for pleasure; that she paid for all the petrol and oil; that her son J. resided with her; that she paid the rent for a lock-up garage, the key of which was kept by her son C. At the trial the plaintiff produced a witness who stated that he saw J. driving his mother's car more than once prior to the day of the accident. The defendant denied that she knew that her son J. had a key of the garage in his possession on the day of the accident, or that she knew he had access to the key, and stated that she never at any time gave J. permission to drive her car, and that he never drove it to her knowledge. An application for a direction in the defendant's favour on the

ground that there was no evidence that the defendant's son J. was on the occasion of the accident acting as the servant or agent of the defendant, or that he was engaged on the defendant's business, was refused. The trial judge amongst other questions asked the jury to find whether the defendant's son J. was at the time of the accident driving the motor car with either the express or implied authority of the defendant. The jury answered in the affirmative, and found in answer to a supplemental question that the authority was implied. The jury found £2,250 damages against the defendant, who moved to have the verdict set aside and judgment entered for her in the action. *Held*, by the Court of Appeal (Andrews and Best L.J.J.), that if the answer of the jury that J. at the time of the accident was driving the car with the implied authority of the defendant, amounted to a finding of agency, it must be set aside on the ground that there was no evidence to support it; and if the answer amounted to a finding of bailment that the verdict must be set aside, as a bailor is not responsible for the negligence of his bailee. *Gibson v. O'Keeney*.

[App. 66]

**NORTHERN IRELAND LAND ACT, 1925—Owners' costs of sale—Superior interest—Priority of claims.** The estate of E.S. vested in the Land Purchase Commission by virtue of the Northern Ireland Land Act, 1925. The purchase money was insufficient to meet the owners' costs of sale and the redemption price of a superior interest. *Held* (by Megaw K.C., Judicial Commissioner) that in the case of an estate sold under the Northern Ireland Land Act, 1925, the owners' costs must first be paid, and that the costs of making title to any superior interest take priority to the redemption price thereof. *Stringer's Estate*.

[Jud. Com. 128]

**PRACTICE (1)—CASE STATED—Divisional court—Hearing before two judges—Effect of difference of opinion.** In a case stated by the Recorder of B., where he had over-ruled a determination of the Commissioners of Inland Revenue as to the amount of the deficiency for excess profits duty sustained by Barrie, Limited, during the accounting period ending 30th June, 1921, the sole question for decision was at what date, whether

before or after June 30th, 1921, a loss arising out of a certain contract had been sustained. The court differed, Moore L.C.J. holding that the loss could not be brought as a deduction into the accounting period, and Brown J. holding that it ought to be included in the accounting period. After argument as to the effect of this division of opinion the court decided to make no order, the result being that the Recorder's decision stood. *Commissioners of Inland Revenue v. Barrie, Limited*. [K.B.D. 209]

**PRACTICE (2)—NEW TRIAL MOTION—Leave to amend notice by applying for judgment for plaintiff—Jurisdiction of Court of Appeal to enter judgment—Rules of Supreme Court (Ireland) Order 58, r. 4.** On appeal to the Court of Appeal by a plaintiff from a verdict and judgment for the defendant, the plaintiff asked that the finding of the jury and the judgment entered by the trial judge should be set aside and a new trial directed. The plaintiff at the hearing asked for liberty to amend his notice of appeal by applying in the alternative for judgment with costs. *Held*, by the Court of Appeal (Moore L.C.J. and Best L.J.J.), that being satisfied that the findings of a jury were against the evidence and the weight of evidence and such as no jury could reasonably find, the court was not bound to order a new trial, but under Order 58, r. 4, might and ought to direct judgment to be entered for the party in whose favour the jury should have found. *Steele v. Gilliland*.

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**PREFERENTIAL PAYMENTS**  
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**REVENUE—CORPORATION PROFITS TAX—Company in liquidation carrying on a trade—Realization sales incidental to winding up or profits arising from trading—Decision of Special Commissioners upon case stated—Appeal to Recorder—Effect of decision of Recorder—Finance Act, 1920 (10 & 11 Geo. 5, c. 18), part 5, s. 52 (1), (2), (3).** The defendant company carried on a large distilling business. In July and August, 1920, the company passed resolutions for a voluntary winding up. The liquidator, with a view to

realization, did some distilling, but no distilling was done after the end of the tax year 1920-21. In the tax year 1921-22 large sales of stock were effected. The company was assessed to Corporation Profits Tax in respect of the years 6th April, 1921—30th September, 1921, 1921-22, 1922-23, on the footing that the liquidator had carried on a trade in the years covered by these assessments. On appeal the Special Commissioners confirmed the assessments. The defendant company appealed from this decision to the Recorder, who discharged the assessments on the ground that the profits did not arise from the carrying on of a trade but from realization sales, and capital transactions, incidental to the winding up of the business. *Held* by the King's Bench Division (Moore L.C.J. and Brown J.) that the Recorder having found as a fact that these were not ordinary trading sales, and that therefore the profits were not profits of trade, they could not overrule his decision. *Commissioners of Inland Revenue v. The Old Bushmills Distillery Company Limited (in Liquidation)*.

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—15 & 16 Geo. 5 (N.I.), c. 34, Sch.  
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**STOCKBROKER—FRAUDULENT DEALING—PRIVITY—Insolvency of stockbroker—Proceeds of cash order—Circumstances leading to inquiry—Abstention from inquiry—Notice—Transaction not in ordinary course of business.** S. & Co., a firm of stockbrokers, sold for the plaintiff £1,000 five per cent. war loan stock. At the time of the sale S. & Co. had overdrawn their account with the defendants by £2,300, thereby exceeding by £300 the limit up to which they had permission to overdraw. M., the defendants' manager, having heard rumours of the insolvency of the firm had an interview with C., a member of the firm, who then estimated their liabilities at from £30,000 to £40,000, and said it would be difficult to meet their clients who were pressing. On the following day M. obtained from C.

a cash order for £999 10s 0d, the proceeds of the sale of the plaintiff's stock, which M. placed to the credit of the firm's account. M. in his evidence stated that the bank did not make inquiries about cash orders, and that he had no knowledge that the money represented the plaintiff's money, and added that on seeing the documents, contract certificate and transfer, as a banker he would assume that they were the property of C. as they came from his custody, even though he was a broker. C.'s account of the interview was that M. told him that his overdraft exceeded the limit by £300, and urged him to reduce it to the authorized amount, and asked him had he any cheques which he could send down, to which C. replied "No." In an action by the plaintiff to recover the proceeds of the sale from the banking company, the jury found that the defendants ought to have known that the proceeds of the cash order were the property of the plaintiff, and that C. was not entitled to lodge the money to his own account. The Court of Appeal (Andrews and Best L.J.J.) affirmed the decision of Moore L.C.J., who had entered judgment for the plaintiff, and held that the defendants, who through their manager were aware of C.'s state of insolvency, either knew the full facts regarding the cash order, or though put on inquiry wilfully shut their eyes, and were affected by, and in law privy to, their customers' fraud. *Cunningham v. Northern Banking Co., Ltd.*

[APP. 112]

**SUPERIOR INTEREST**—Estate sold under Northern Ireland Land Act, 1925. Costs of making title take priority to redemption price. *Stringer's Estate* ... 128  
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**TORT**—ACCEPTANCE OF MONEY FROM TORT FEASOR FOR TORT—*Release of joint tortfeasors—Alternative causes of action tried together—Damages recoverable once only in respect of substantially same cause of action—R.S.C. (Ir.) 1905, Or. 18, r. 1, Statements in prospectus—Liability for—Companies (Consolidation) Act, 1908, s. 84*. The plaintiff had bought debentures in W.C. & Co., Ltd., on the faith of statements in a prospectus. Some of the defendants were directors in W.C. & Co., Ltd., and some were partners in an issuing house called S. & Co., who the pro-

spectus stated had purchased the whole of the issue of debenture stock, but who plaintiff alleged had offered the debentures to the public and issued the prospectus merely as agents for the other defendants. The plaintiff claimed against all the defendants damages for fraudulent misrepresentations in the prospectus and for conspiracy to defraud and against such of the defendants as were directors in W.C. & Co., Ltd., claimed compensation under the provisions of the Companies (Consolidation) Act, 1908, section 84. Brown J. at the trial ruled that there was no evidence proper to be submitted to the jury against the defendants, J.E., G.S.C., C.E.A., and G.E.C., directors in W.C. & Co., Ltd., in respect of any of the several causes of action in the statement of claim, dismissed the action as against the said four defendants with costs, and directed in favour of the remaining defendants (except F.W., who had died) in respect of the second and third causes of action. The action then proceeded against the remaining defendants until (by leave of the court) they amended their defence, and whilst denying liability, brought into court £130 which the plaintiff accepted in full satisfaction of the cause of action for fraudulent misrepresentation. The plaintiff appealed and asked to have the direction given in favour of the said four defendants on the cause of action for fraudulent misrepresentation set aside. Held by the Court of Appeal (Moore L.C.J. and Andrews and Best L.J.J.) that the plaintiff's acceptance of the money paid into court in satisfaction of the claim for fraudulent misrepresentation was a bar to any further proceedings for damages in respect of the same cause of action against the other alleged joint tortfeasors who made no such payment. As to the claim for compensation under Section 84 of the Companies (Consolidation) Act, 1908, the court held that the plaintiff was entitled to have the alternative causes of action for compensation under this section and for misrepresentation and conspiracy submitted to the jury subject to two limitations, first, that he could not get damages more than once in respect of what was in substance the same cause of action, and second, that the causes of action, in the opinion of the trial judge, could conveniently be tried or disposed of together. Held also, affirming the judgment of Brown J. on this point, that Section 84 of the Companies Act,

1908, is confined to a prospectus issued by or on behalf of the company, *but held* that the question whether S. & Co. were purchasers of the issue, or merely an issuing house or agents for the company, was one of fact on which there was sufficient evidence to entitle the plaintiff to have it submitted to the jury—the judgment of the trial judge being set aside in this respect. *Held* further that in as much as the facts proved amounted to a prima facie case of conspiracy the defendants should have been called upon to answer it, and that as it was for the jury to determine whether the entire evidence established the existence of the conspiracy charged, the plaintiff was entitled to a new trial of this issue. *Held* by Moore L.C.J. and Best L.J. that if the plaintiff succeeded on the cause of action under section 84 of the Companies (Consolidation) Act, 1909, he would be entitled to such “compensation” as he might prove, in addition to any damages already received in respect of fraudulent misrepresentation. *Held* by Andrews L.J. (dissenting on this point only) that the measure of “compensation” under that section was the same as in the common law action of deceit, and that as the plaintiff had by acceptance of the £130 disentitled himself to any right to judgment for compensation in respect of the statutory tort, there should be no new trial in respect of this cause of action. *Urquhart v. Stracey and others.*

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**WILL (1), EXECUTION OF**—POSITION OF TESTATOR'S SIGNATURE—“Foot or end”—*The Wills Act, 1837* (1 Vict., c. 26), s. 9—*The Wills Amendment Act, 1852* (15 & 16 Vict., c. 24) s. 1—*Disposition following signature.* W.M.'s will was written out by S., a witness, on the instructions and in the presence of W.M., on a printed form consisting of a large sheet of paper folded vertically so as to form four pages. The first page, numbered “1” in writing, contained the appointment of executors and certain devises and bequests. The letters “P.T.O.” were written at the bottom right hand corner of this page. Page 2, which was also so numbered, contained further bequests, followed by the testator's

signature and the attestation clause (in print) and in the bottom right hand corner there again were written the letters “P.T.O.” There was not sufficient room on page 2 for a residuary clause and directions as to payment in full of charitable legacies, and probably for this reason they were written on the upper half of the next page numbered in writing “page 3.” *Held*, by the Court of Appeal (Andrews and Best, L.J.J.), varying the order of Moore, L.C.J., who had admitted the entire document to probate, that the first and second pages of the document should be admitted, but that the writing on the third page should be excluded from the grant of probate as that portion of the will followed the signature. In the *Goods of Ffrench* (23 L.R. Ir. 433) dissented from. *Goods of Martin.*

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**WILL (2)—SPECIFIC OR DEMONSTRATIVE LEGACIES.** A.B. by his will directed that certain pecuniary legacies amounting in all to the sum of £710 should be paid “with and out of the proceeds” of the sale of his investments comprising stocks and shares. The investments realized the sum of £487 0s 4d. At the date when the will was made they were worth approximately the sum of £481 12s 6d. There was a further direction that the legacies were to be paid free of all Crown duties. The testator further dealt with the residue of his property item by item. On a summons raising the question whether the balance of the legacies was payable out of the general residue of the estate, *Held*, by Wilson J., that the balance was not so payable and that as the fund specified by the testator for their payment was insufficient to pay them in full, they must abate rateably inter se. *Boyd d., Boyd v. Boyd* ... 14

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